International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO and Engineers Union, Local 444, International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO (Paramax Systems Corporation, formerly known as Surveillance and Fire Control Systems Division and the Systems Management Unit of Shipboard and Ground Systems Group, Unisys Corporation) ***and*** **Lawrence Ferriso.** Case 29–CB–8176

May 28, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On November 12, 1992, Administrative Law Judge Steven Davis issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Charging Party filed cross-exceptions and a supporting brief, and the Respondents filed answering briefs.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs,[1] and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

I. BACKGROUND

A. *Facts*

The Employer, Paramax Systems Corporation (previously Unisys Corporation), manufactures and distributes electronic and security equipment. Since at least 1970, the Respondents, International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO, and its Engineers Local 444, jointly have represented engineering and quality control employees at Paramax' New York facilities. Paramax and the Respondents have been party to successive collective-bargaining agreements covering this unit. These agreements contain identical union-security clauses providing that:

> All present employees of the Employer, and those who in the future enter the bargaining unit, shall join the Union by the thirtieth day following the beginning of their employment, or by the thirtieth day following the effective date of this agreement, whichever is later, and continue to remain members of the Union in good standing as a term and condition of employment.

The most recent agreement, which was executed on November 25, 1991, is effective from September 6, 1991, until February 3, 1995.

On November 6, 1991, Paramax employee Lawrence Ferriso filed an 8(b)(1)(A) charge against the Respondents alleging that the union-security clause violated employees' rights under Section 7 of the National Labor Relations Act (NLRA) and *Pattern Makers League v. NLRB*, 473 U.S. 95 (1985). Ferriso amended his charge on January 6, 1992, to allege that the union-security clause additionally violated Section 8(b)(2). On January 15, 1992, the General Counsel issued a complaint alleging that the Respondents violated both sections by maintaining a union-security clause which ''fails to state that the only condition of continued employment of the employees . . . is the payment of initiation fees and dues.''

Charging Party Ferriso is not a union member. Since 1991, he has paid Respondent Local 444 reduced dues as specified in *Communications Workers v. Beck*, supra. It is not alleged, nor is there evidence, that during relevant periods the Respondents requested that Paramax terminate Ferriso or any other employee for failing to comply with the union-security provision. The record establishes that, during the two most recent collective-bargaining agreements, Paramax has deducted union dues from all employees who signed checkoff authorizations, and has forwarded these moneys to Respondent Local 444. From these dues, Local 444 has sent a per-capita tax to its District and to the Respondent International Union.

B. *Judge's Findings*

The General Counsel argued that the union-security clause—requiring membership in good standing—was facially invalid under *NLRB v. General Motors Corp.*[2] because it failed to specify that the payment of dues and initiation fees was the only required condition of employment. The General Counsel argued that in order for the Respondents to fulfill their statutory duty of fair representation, they had to: (1) refrain from misleading employees into believing that their union-security obligation was broader than required by law; and (2) eliminate confusion about employee obligations.

The judge rejected the General Counsel's arguments. He found the union-security clause lawful because it

[1] Pursuant to a February 23, 1993 invitation to submit briefs, the parties were permitted to file supplemental briefs addressing the impact on this case of the Board's proposed rulemaking in *Communications Workers v. Beck*, 487 U.S. 735 (1988), 57 Fed.Reg. 43635 (1992). Only the General Counsel sought to file such a brief. We grant the General Counsel's unopposed motion to file that brief out-of-time. We agree that the brief is acceptable under the provisions of Sec. 102.111(c) of the Board's Rules.

For the reasons stated in his dissent in *Postal Service*, 309 NLRB 305 (1992), Member Oviatt would deny the General Counsel's request to file an out-of-time supplemental brief. Thus, Member Oviatt narrowly construes ''excusable neglect'' under Sec. 102.111(c) to permit late filings only where a party demonstrates that, despite its assiduous attempts to comply with the Board's Rules and Regulations, it missed the filing date. In Member Oviatt's view, the General Counsel failed to establish such excusable neglect.

[2] 373 U.S. 734 (1963).

was fashioned after the Board's longstanding model in *Keystone*.[3] The judge also rejected the General Counsel's claim that *Paragon Products Corp*.[4] overruled *Keystone*. Instead, he concluded that *Paragon Products* overruled the presumption of illegality of clauses that do not track the statutory language, but that the decision did not affect the legality of the *Keystone* model clause itself.

The judge additionally rejected the General Counsel's alternative argument that even if *Keystone* survived *Paragon Products*, its model clause was deficient because its words ''members in good standing'' are not those contained in Section 8(a)(3). The judge found that this alternative argument sought precisely what the Board condemned in *Paragon Products*—the presumed illegality of a clause that was not facially unlawful. *NLRB v. News Syndicate Co.*, 365 U.S. 695 (1961). Finally, the judge concluded that the Respondents were not obligated to conform the language of the union-security clause to evolving case law. Rather, as the contractual language was patterned after the *Keystone* model, which remained good law, the judge found that the Respondents did not violate the Act.

C. *Exceptions*

The General Counsel excepts, again arguing that *Paragon Products* overruled the *Keystone* model clause, and that *Keystone* was incorrectly decided because its clause did not track the language of Section 8(a)(3). The General Counsel further contends that the Paramax clause violates the rule in *Paragon Products* because ''membership in good standing'' implies that employees have obligations beyond the payment of periodic dues and initiation fees.

Although the General Counsel concedes that requiring ''membership in good standing'' does not expressly mandate unlawful action, he nonetheless argues that the clause should be struck down rather than given a lawful construction. *Spartan Aircraft Co.*, 98 NLRB 73, 75 (1952); *NLRB v. News Syndicate*, supra at 699–700; *Paragon Products*, supra at 664. Thus, he contends that since ''membership'' in pre-*Beck* cases was interpreted to mean ''dues and fees,'' ''membership in good standing'' clearly implies additional obligations. Further, argues the General Counsel, the typical employee interprets ''membership in the Union in good standing'' as requiring maintenance of full membership without delinquencies of any kind. At a minimum, the employee is confused about his or her obligations.

The General Counsel concedes that the Respondents would not have violated the Act had they further defined ''membership in good standing'' to mean only the payment of periodic dues and fees. By not offering this explanation, however, the General Counsel argues that the Respondents violated the Act. *Zangerle Peterson Co.*, 123 NLRB 1027 (1959); *Hershey Foods Corp.*, 207 NLRB 897 (1973), enfd. 513 F.2d 1083, 1085–1086 (9th Cir. 1975).

The General Counsel additionally maintains that because the union-security clause is facially unlawful, it violates Section 8(b)(2). *J. W. Bateson Co.*, 134 NLRB 1654 (1961); *Meatcutters Local 421 (Great Atlantic & Pacific)*, 81 NLRB 1052 (1949). Finally, the General Counsel argues that, assuming the Board finds the violations, as alleged, it would not be unduly burdensome for the Board to retroactively apply its decision. *SEC v. Chenery*, 332 U.S. 194 (1947); *Electrical Workers IUE Local 900 v. NLRB*, 727 F.2d 1184, 1194 (D.C. Cir. 1984).

The Charging Party similarly excepts to the judge's decision, arguing that the challenged union-security clause is unlawful because it requires that employees: (1) ''join'' the union; (2) ''remain'' union members; (3) remain ''members in good standing''; and (4) specifies that membership is a ''term and condition of employment.'' Specifically, the Charging Party argues that the union-security clause violates the principle of ''voluntary unionism'' applied in *Pattern Makers*, and is unlawful under *Beck*. In order to ensure that employees' Section 7 rights are protected, the Charging Party argues that the clause must precisely apprise them of their obligations and options. The Charging Party further asserts that whatever defense *Keystone* once afforded the Respondents, it ceased when *Beck* issued. Finally, as a remedy, the Charging Party requests that the Board order the Respondents to: (1) pay Ferriso and other employees the sums exacted under the unlawful union-security clause; (2) expunge the unlawful provision; (3) insert, in any replacement clause, language apprising employees of their *Pattern Makers* and *Beck* rights; and (4) post appropriate notices at all locations governed by the unlawful union-security provision.

D. *Answering Arguments*

The Respondent International Union argues that its union-security clause is substantially similar to the *Keystone* model which the Board has approved for over 30 years. It further contends that when the Supreme Court whittled down the membership obligations in *General Motors* and *Beck*, it did not find the standard union-security clause unlawful. The International notes that as recently as April 1991, the General Counsel maintained that *General Motors*, *Beck*, and *Pattern Makers* rights need not be expressly set

[3] *Keystone Coat, Apron & Towel Co.*, 121 NLRB 880 (1958). The *Keystone* clause provided in relevant part, that:

> It shall be a condition of employment that all employees of the employer covered by this agreement who are members of the Union in good standing on the effective date of this agreement shall remain members in good standing . . . .

[4] 134 NLRB 662 (1961).

forth in a union-security clause in order for that clause to be facially valid.[5] The International submits that no subsequent decision warrants a contrary result.

Respondent Local 444 additionally argues that the judge properly dismissed the complaint because: (1) the union-security clause adheres to the *Keystone* model; (2) the clause does not run afoul of the *Paragon Products* prohibitions; and (3) there is no evidence that unit employees were required to become more than ''financial core'' members.

II. ANALYSIS

A. *Overview*

We agree with the General Counsel and the Charging Party, for the reasons stated below, that the Respondents violated Section 8(b)(1)(A) by maintaining a union-security clause requiring that employees become and remain ''members of the Union in good standing'' as a condition of employment, without apprising them of their *General Motors* rights.[6] We further find, however, for the reasons set forth in section II,J, of this decision, that the Respondents did not violate Section 8(b)(2) of the Act.

B. *The Statutory Framework for Union-Security Agreements*

As a starting point in our analysis, we examine the statutory framework for union-security provisions. In 1935, Congress enacted the National Labor Relations Act (NLRA)—commonly termed the Wagner Act. Among the Wagner Act's provisions was Section 7 which protected employees' rights to, among other things, join unions and bargain through their chosen representatives. The 1935 Act also created Section 8(3) which prohibited employers from ''encourag[ing] or discourag[ing] membership in any labor organization . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment.'' Although this language, literally interpreted, proscribed union-security agreements, Congress specifically preserved the ''closed shop'' agreement by appending the following proviso to Section 8(3):

> *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . . to require as a condition of employment membership therein . . . if such labor organization is the representative of the employees . . . (29 U.S.C. § 151 (1935))

As a result of this legislation, certified or validly recognized labor organizations were privileged to enter into ''closed shop'' agreements with employers restricting employment to individuals who were, and would remain, union members. The Board and courts interpreted the proviso to Section 8(3) as also protecting lesser forms of union security, in addition to the closed shop.[7]

Following the Wagner Act, closed-shop agreements flourished. Under these agreements, unit employees could be required to ''attend union meetings, support union leaders, and otherwise adhere to union rules.'' *Pattern Makers League v. NLRB*, supra, 473 U.S. at 105. Accompanying the increase of closed-shop agreements, however, was growing congressional concern that the compulsory unionism they sanctioned ''creat[ed] too great a barrier to free employment.''[8] To redress this concern, while still affording unions protection against ''free riders,'' Congress amended Section 8(3) in the 1947 Taft-Hartley Act. Specifically, Congress relettered Section 8(3) to Section 8(a)(3),[9] and substituted the following for the original ''closed shop'' proviso:

> *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement,

[5] *Office Employees Local 29*, 18 AMR Sec. 28070 (NLRB Advice Memorandum Reporter).

[6] As discussed below, we do not agree with the General Counsel and Charging Party that the clause is facially unlawful. Rather, we find it ambiguous, and conclude that the Respondents' failure to clarify the ambiguity constituted a breach of their duty of fair representation under Sec. 8(b)(1)(A).

We additionally do not consider the Charging Party's argument that the term ''members'' in the challenged union-security clause also violates the Act. The General Counsel's consistent theory throughout this proceeding as alleged in the complaint was that requiring employees to be ''members in *good standing*'' not merely ''members'' violated Sec. 8(b)(1)(A) and (2). (Emphasis added.) Because the General Counsel determines the legal theory in an unfair labor practice case, and the legality of requiring employees to be mere ''members'' was not litigated, the Charging Party's additional argument is not before us. See, e.g., *Teamsters Local 203 (Union Interiors)*, 298 NLRB 315 (1990).

Finally, we note that the General Counsel alleged and litigated that the union-security clause was unlawful because it failed to inform employees of their *General Motors* rights. The General Counsel did not allege that the clause also unlawfully failed to inform employees of their *Beck* rights. Accordingly, that issue is not before us.

[7] *M & J Tracy, Inc.*, 12 NLRB 916, 931–934 (1939); *J. E. Pearce Contracting Co.*, 20 NLRB 1061, 1070–1073 (1940); *Public Service Co.*, 89 NLRB 418 (1950); *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355, 361 (1949). See also Dau-Schmidt, *Union Security Agreements under the National Labor Relations Act: The Statute, the Constitution, and the Court's Opinion in Beck*, 27 Harv. J. on Legis. 50, 85–88 (1990); Wheaton, *Beck and the National Labor Relations Board: An Analysis of Agency Fee Objection Law and Suggested Approach for the Board*, 1990 Det. C.L. Rev. 633, 637.

[8] S. Rep. No. 105, 80th Cong., 1st. Sess. 6 (1947).

[9] Sec. 8(3) was relettered because of the addition of Sec. 8(b) prohibitions against certain union unfair labor practices.

> whichever is the later,[10] . . . *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.[11]

The effect of the 1947 provisos was to: (1) eliminate the closed shop; (2) preserve the union shop and lesser forms of union security; provided, however, that (3) ''expulsion from a union [could not] be a ground for compulsory discharge if the worker [was] not delinquent in paying his initiation fees or dues.'' S. Rep. No. 105, 80th Cong., 1st Sess. 7 (1947).

In the 1947 amendments, Congress also augmented Section 7 to give employees the right to ''refrain from'' the activities protected in that Section. Additionally, Congress enacted Section 8(b)(1)(A), which prohibited unions from restraining or coercing employees in the exercise of their Section 7 rights. Section 8(b)(2) was also enacted, making it illegal for unions to cause or attempt to cause employers to discriminate against employees in violation of Section 8(a)(3), or to ''discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.'' 29 U.S.C. § 158(b)(2).

C. *Board Interpretation of Section 8(a)(3)*

The legislative history of the 1947 Taft-Hartley amendments made clear that Section 8(a)(3)'s second proviso was intended to prohibit employers from discharging employees under union-security provisions if the union excluded these employees from membership or denied them membership for reasons other than their nonpayment of dues and fees. Less clear, however, was whether employees subject to a union-security provision could be required under the second proviso to apply for membership as well as pay dues and fees.[12] In *Union Starch Co.*,[13] the Board answered this question in the negative, holding that payment of dues and initiation fees was the only lawful condition to continued employment. As stated by the Board majority in *Union Starch*:

> If the union imposes any other qualifications and conditions for membership with which [an employee] is unwilling to comply, such an employee may not be entitled to membership, but he is entitled to keep his job. Throughout the amendment to the Act, Congress evinced a strong concern for protecting the individual employee in a right to refrain from union activity and to keep his job even in a union shop. Congress carefully limited the sphere of permissible union security, and even in that limited sphere accorded the union no power to effect the discharge of nonmembers except to protect itself against ''free rides.'' [footnotes omitted]; [87 NLRB at 784–785].

Over their dissenting colleagues' argument that ''membership'' under Section 8(a)(3) entailed much more than a willingness to pay dues and fees, the majority held that ''membership'' meant only that.

Subsequently, the Board adhered to *Union Starch*, finding that attempts to discharge unit employees because of union requirements other than payment of dues and fees violated the Act.[14] Thus, under *Union Starch* and its progeny, the Board construed the 1947 amendments to effectively limit enforcement of union-security provisions to, at most, obligations arising under an agency shop.

While the Board was interpreting the 1947 amendments in *Union Starch* and other unfair labor practice cases, it also considered union-security clauses in the representation context. In *Keystone*, the Board considered whether collective-bargaining agreements containing union-security clauses barred election petitions. In *Keystone*, the Board determined that contracts containing such provisions would bar elections except when the clauses had been adjudged unlawful in unfair labor practice proceedings, or where they facially did not comply with the requirements of Section 8(a)(3). In order to assist practitioners in drafting union-security provisions that adhered to the statutory requirements, the Board included a model provision in *Keystone*. This provision, which the Board termed the ''maxi-

[10] In 1959, this proviso was modified to permit agreements requiring membership after 7 days in the construction industry.

[11] Under the 1947 amendments, an employer and union could not negotiate a union-security provision unless a majority of unit employees first authorized it. This requirement was repealed in 1951. Dua-Schmidt, supra at 92.

[12] Dau-Schmidt, supra at 93.

[13] 87 NLRB 779 (1949), enfd. 186 F.2d 1008 (7th Cir. 1951), cert. denied 342 U.S. 815 (1951).

[14] See, e.g., *Hershey Foods Corp.*, supra (forcing employees to remain on union membership roles); *Service Employees Local 680 (Leland Stanford Jr. University)*, 232 NLRB 326, 326 fn. 1 (1977), enfd. 601 F.2d 980 (9th Cir. 1979) (requiring membership oath); *Boilermakers Local 749 (California Blowpipe)*, 192 NLRB 502 (1971), enfd. 466 F.2d 343, 345 (D.C. Cir. 1972), cert. denied 410 U.S. 926 (1973) (requiring employees to sign membership cards).

mum permissible in conformity with the requirements of the Act,''[15] provided that:

> It shall be a condition of employment that all employees of the Employer covered by this agreement who are members of the Union in good standing on the effective date of this agreement shall remain members in good standing and those who are not members on the effective date of this agreement shall, on the thirtieth day [or such longer period as the parties may specify] following the effective date of this agreement, become and remain members in good standing in the Union. It shall also be a condition of employment that all employees covered by this agreement and hired on or after its effective date shall, on the thirtieth day following the beginning of such employment [or such longer period as the parties may specify] become and remain members in good standing in the Union.

Although the phrase ''members in good standing'' in the *Keystone* clause did not mirror the language in Section 8(a)(3), the Board made clear that lawful union-security clauses could impose no condition on employment except the payment of initiation fees and dues. 122 NLRB at 884.

Following *Keystone*, the Board frequently cited, with approval, its model union-security clause.[16] In 1961, however, the Board sharply limited *Keystone* as a result of the Supreme Court's decision in *NLRB v. News Syndicate*.[17] In *News Syndicate*, the Court stated that unions and employers would not be presumed to violate federal law. Instead, the Court found that ''[i]n the absence of provisions calling explicitly for illegal conduct, [a] contract cannot be held illegal because it failed affirmatively to disclaim all illegal objectives.''[18] Adopting the *News Syndicate* rationale, the Board held in *Paragon Products*, supra, that it would no longer presume that union-security clauses were illegal for contract-bar purposes if they did not expressly reflect the limitations of the Act. Instead, the Board said that only those clauses which were clearly unlawful on their face,[19] or which had been found unlawful in unfair labor practice proceedings, would not bar representation petitions.

Although *Paragon Products* overruled *Keystone* in the manner discussed above, it neither discussed nor repudiated the model union-security clause. After *Paragon Products*, the *Keystone* clause was seldom cited or discussed.[20] Indeed, until *Beck*, it does not appear that the legality of the model clause, or clauses similarly requiring ''membership in good standing,'' were ever alleged to violate the Act.

D. *Judicial Interpretation of Section 8(a)(3)*

Following the Taft-Hartley amendments, courts similarly interpreted ''membership'' under Section 8(a)(3) and its provisos. The rationale for this interpretation was articulated in *Radio Officers v. NLRB*, 347 U.S. 17, 40–41 (1954):

> Thus, Sections 8(a)(3) and 8(b)(2) were designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood. The only limitation Congress has chosen to impose on this right is specified in the proviso to Section 8(a)(3) which authorizes employers to enter into certain union security contracts . . . [however,] the legislative history clearly indicates that Congress intended to prevent utilization of union security agreements for any purpose other than to compel payment of dues and fees. (footnotes omitted)

In *NLRB v. General Motors Corp.*, supra, the Supreme Court further clarified the restrictive force of the 8(a)(3) provisos by holding that ''membership'' as a condition of employment was ''whittled down to its financial core.'' 373 U.S. at 742.

Consistent with this interpretation of Section 8(a)(3), the Court held in *Pattern Makers* that full union membership could not be a condition of employment. 473 U.S. at 106–107. Although the Court acknowledged that unions and employers were free to enter into union-security agreements, it held that these agreements could not prevent individuals from resigning from membership, or subject them to discharge because of their resignation. To hold otherwise, said the Court, would undercut the Act's policy of voluntary unionism. Id. at 114.

Apart from the decisions in *General Motors* and *Pattern Makers*, Board and Court interpretation of Section 8(a)(3) and union-security agreements remained relatively static. In 1988, however, the Court issued its *Beck* decision, altering the interpretation of Section 8(a)(3), and with it, unit employees' obligations.

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[15] *Keystone*, supra, 121 NLRB at 885.

[16] *National Brassiere Products Corp.*, 122 NLRB 965, 966 (1959); *Zangerle Peterson Co.*, supra at 1028; *Grand Union Co.*, 123 NLRB 1665, 1666 (1959), enf. denied on other grounds 284 F.2d 254 (D.C. Cir. 1960); *Charles Leonard, Inc.*, 131 NLRB 1104, 1105 fn. 3 (1961).

[17] See also *Teamsters Local 357 v. NLRB*, 365 U.S. 667 (1961).

[18] Id. at 699, quoting 279 F.2d at 330 (2d Cir. 1960).

[19] See, e.g., *Red Star Express Line v. NLRB*, 196 F.2d 78 (2d Cir. 1952); *Convair*, 111 NLRB 1055, 1057 (1955), modified sub nom. *NLRB v. Machinists Lodge 1254*, 241 F.2d 695 (9th Cir. 1957).

[20] *Goehring Meat Co.*, 183 NLRB 405, 406 fn. 2 (1970). Cf. *Service Employees Local 680 v. NLRB*, 601 F.2d 980, 983 (9th Cir. 1979).

E. *Communications Workers v. Beck*

During the period when the Board and courts uniformly interpreted union-security agreements under the NLRA as requiring, at most, that employees pay periodic dues and initiation fees as a condition of employment, a divergent body of law developed under the Railway Labor Act (RLA). 45 U.S.C. § 152. Thus, although there were similarities between the language of Section 8(a)(3) and Section 2, Eleventh,[21] its RLA counterpart, the statutes ''differ[ed] in certain crucial respects.''[22] As a consequence, separate bodies of law developed, and courts were reluctant to rely on one when interpreting the other.[23]

In 1961, the Supreme Court construed RLA Section 2, Eleventh, as restricting the obligation that union-security clauses could impose on employees in certain respects, and this restriction had no parallel in any of the cases construing the NLRA. In *Machinists v. Street*,[24] the Court held that the Section 2, Eleventh, prevented unions from compelling nonmembers to pay dues for political purposes to which they objected. More than two decades later, the Court further refined the scope of Section 2, Eleventh, by holding that unit employees could be compelled to pay only those dues covering expenses ''necessarily and reasonably'' incurred in the unions' performance of collective-bargaining duties. *Ellis v. Railway Clerks*, 466 U.S. 435 (1984).[25] Thus, unlike employees under the NLRA, who could be required to tender full initiation fees and dues, employees governed by the RLA were only obligated to remit their ''fair share'' of the union's representative costs.

In 1988, in the *Beck* case, the Supreme Court extended its holdings in *Street* and *Ellis* to Section 8(a)(3). In *Beck*, the Court noted that Section 8(a)(3) and Section 2, Eleventh, were, in all material respects, identical. The Court further found that when enacting both statutes, Congress' purpose was to authorize compulsory unionism only as needed to ensure that ''those who enjoy union-negotiated benefits contribute to their cost.'' 487 U.S. at 746. Because of the congruity between Section 8(a)(3) and Section 2, Eleventh, and the similarity of legislative intent, the Court concluded that Section 8(a)(3), like Section 2, Eleventh, does not permit expenditures of dues and fees collected from objecting employees on activities outside the union's role as collective-bargaining representative.

The impact of *Beck* is significant. By limiting objecting employees' obligations under union-security clauses, the Supreme Court reduced the maximum financial obligations that can be imposed on unit employees. More significantly, the Court modified the interpretation of Section 8(a)(3) to which the Board and courts had adhered since 1947. Because *Beck* so altered the statutory construct of Section 8(a)(3), we have reexamined this provision as well as the attendant rights and obligations it imposes on unions and employees they represent.

F. *Reexamination of the Requirements of Section 8(a)(3)*

Our reexamination of Section 8(a)(3) discloses that although Congress' intent in amending Section 8(a)(3) was to outlaw the closed shop while preserving union shops and lesser forms of union security, Congress never specified what ''union shop'' meant. Senator Taft, a sponsor of the 1947 amendments, conceded that ''the union shop is not defined. No one knows what it is. We did not use the term in the bill.'' Leg. Hist. 1408 (LMRA 1947). Further, when Congress drafted Section 8(a)(3), permitting employers and unions to enter into union-security agreements making membership a condition of employment, it failed to define ''membership.'' Only by examining this term in conjunction with the second proviso to Section 8(a)(3) can the extent of employees' obligations be ascertained.

After the 1947 amendments, the Board and courts further interpreted the ''membership'' obligation under Section 8(a)(3). In so doing, however, the Board and courts did little to clarify any statutory imprecision or apprise employees of their actual obligations. On the contrary, some decisions further obfuscated the statutory requirements. For example, the *Keystone* model union-security clause arguably increased confusion about employees' obligations under Section 8(a)(3). Thus, although the Board stated in *Keystone* that contracts would bar elections only if their union-security clauses ''facially complied'' with the requirements of Section 8(a)(3)—a principle subsequently repudiated in *Paragon Products*—*Keystone*'s model clause did not mirror the statutory language. Instead, the Board re-

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[21] Sec. 2, Eleventh provides, in relevant part that:

> [A]ny carrier . . . and a labor organization . . . duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—
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> (a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreement[], whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership. (45 U.S.C. § 152, Eleventh).

[22] *Communications Workers v. Beck*, supra, 487 U.S. at 745.

[23] *Machinists v. Street*, 367 U.S. 740, 743 (1961); *First National Maintenance Corp. v. NLRB*, 452 U.S. 667, 686 fn. 23 (1981).

[24] 367 U.S. 740 (1961).

[25] In 1977, similar restrictions had been imposed on unions representing public-sector employees. *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

placed the statutory term ''membership'' with the ambiguous, and equally undefined phrase, ''members *in good standing*.''

Compounding the statutory and interpretive problems is the fact that unions and employers frequently do not inform employees of their actual union-security obligations. See, e.g., *Service Employees Local 680 v. NLRB*, 601 F.2d 980 (9th Cir. 1979).[26] Whether this omission results from misunderstanding by the contracting parties, inattention, or conscious attempts to mislead employees, the effect is that the average represented employee may well not understand the obligations incurred under a union-security agreement. Cantor, *Uses and Abuses of the Agency Shop*, 59 Notre Dame L. Rev. 61 fn. 2 (1983).[27]

It is estimated that more than 90 percent of the represented employees in approximately two-thirds of the states where union-security agreements are permitted are bound to some form of union-security agreement.[28] Mills, *Labor-Management Relations*, 116 (1982). Despite the prevalence of union-security agreements, there is widespread sentiment that unit employees do not understand their obligations under those agreements.[29] As stated by Thomas Haggard in *Compulsory Unionism, the NLRB, and the Courts*, ''The average worker, unversed in the tortuous complexities of statutory interpretation, would normally construe [''membership'' or ''membership in good standing''] to mean membership in the colloquial sense—i.e., formal membership.'' See also Heldman, *Deregulating Labor Relations*, 69, 70 (1981). Thus, despite the fact that employee options under union-security agreements have actually increased since the 1947 amendments, ''few affected employees can take advantage of this wider latitude because few are aware of the possibility.'' Ibid. Moreover, the likelihood of employees paying more to unions than lawfully may be required under the NLRA has increased under *Beck*, which further limits employees' obligations without any accompanying change in Section 8(a)(3).[30] It is because of this confusion that we examine the instant union-security clause to determine whether it is per se unlawful, as alleged, or, alternatively, whether it is ambiguous.

G. *''Membership in Good Standing'' is Ambiguous*

Contrary to the General Counsel's and Charging Party's arguments, we do not find the Paramax union-security clause facially unlawful. As the Supreme Court made clear in *News Syndicate*, illegal objects will not be presumed, and contracts will not be found unlawful merely because they fail to disclaim all illegal objects. See also *Teamsters Local 357 v. NLRB*, 365 U.S. 667 (1961). Here, the phrase ''members of the Union in good standing'' does not explicitly require that employees bear obligations other than those lawfully imposed under Section 8(a)(3). Cf. *Convair*, supra.[31] On the contrary, ''members of the Union in good standing'' can be interpreted as requiring that Paramax employees merely tender initiation fees and dues.

Although the union-security clause is not unlawful per se, we agree with the General Counsel's alternative argument that the clause, with its phrase ''members of the Union in good standing,'' is ambiguous. Thus, although the clause is capable of a lawful construction, it can also be interpreted as requiring more from Paramax unit employees than is imposed by statute.[32] Indeed, it is likely that employees unversed in the intricacies of Section 8(a)(3) and interpretative decisions will literally interpret the clause as requiring full membership and all attendant financial obligations, e.g., assessments. At a minimum, they will be confused about their obligations. Because of this ambiguity, we next consider whether the Respondents, by virtue of their exclusive representative status, are obligated to apprise Paramax unit employees of their actual obligations. See generally *Electrical Workers IBEW Local 2088 (Lockheed Space)*, 302 NLRB 322, 329 fn. 27 (1991).[33] Resolution of this question requires an examination of the Respondents' duty to fairly represent Paramax unit employees.

H. *Duty of Fair Representation*

1. Overview of the law

The duty of fair representation is a judicially created doctrine founded on the principle of fair dealing. Be-

[26] Heldman, *Deregulating Labor Relations*, 69–71 (1981). See generally *Tacoma Boatbuilding*, 277 NLRB 513 (1985).

[27] Contrary to the suggestion of our dissenting colleague, we are not using a subjective test to determine whether employees are actually confused. Rather, consistent with any other case in which it is alleged that employees are coerced and restrained in the exercise of Sec. 7 rights, we seek to determine, under an objective analysis, the probable reactions of ordinary reasonable employees, and whether the conduct involved would tend to restrain or coerce ordinary reasonable employees.

[28] They are permitted under Sec. 14(b) in all but ''right to work'' states.

[29] Cantor, *Uses and Abuses of the Agency Shop*, 59 Notre Dame L. Rev. 61 fn. 2 (1983); Heldman, *Deregulating Labor Relations*, 69–71 (1981); Haggard, *Compulsory Unionism, the NLRB, and the Courts*, 70 (1977); Wellington, *Union Fines and Workers' Rights*, 85 Yale L. Rev. 1022, 1040 (1976). See generally Morris, *Developing Labor Law*, 1366 (2d ed. 1983).

[30] We note that issues and obligations arising under *Beck* are not before us. We cite this case for historical purposes only.

[31] See also *Teamsters Local 287 (Airborne Express)*, 307 NLRB 980 (1992).

[32] Because the Paramax union-security clause is ambiguous, rather than facially unlawful, it would constitute a contract bar under *Paragon Products*.

[33] See generally *Our Way, Inc.*, 268 NLRB 394, 395 fn. 6 (1983).

cause of the comprehensive power vested in unions as exclusive bargaining representatives, and the corollary dependence of individual unit employees on them, a doctrine has developed requiring unions to deal fairly with employees they represent. This doctrine had its genesis in *Steele v. Louisville & Nashville Railroad Co.*,[34] an RLA case. In *Steele*, the Supreme Court held that concomitant with a union's status as exclusive bargaining representative is its duty to ''exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them.'' 323 U.S. at 203. Subsequently, the Court defined the elements of a union's duty of fair representation as including: (1) serving the interests of all members without hostility or discrimination; (2) exercising its discretion with complete good faith and honesty; and (3) avoiding arbitrary conduct. *Vaca v. Sipes*, 386 U.S. 171, 177 (1967); *Humphrey v. Moore*, 375 U.S. 335, 342 (1964). Where a union's conduct toward a unit member is ''arbitrary, discriminatory, or in bad faith,'' the duty of fair representation is breached. *Vaca v. Sipes*, supra at 190.

Although the duty of fair representation had judicial origins, its principles were extended to the National Labor Relations Act in *Ford Motor Co. v. Huffman*, supra. Thereafter, in *Miranda Fuel Co.*,[35] the Board first held that a breach of the duty of fair representation also was an unfair labor practice under Section 8(b)(1)(A) and (2) of the Act. In *Miranda Fuel*, the Board majority held that:

> The privilege of acting as an exclusive bargaining representative derives from Section 9 of the Act, and a union which would occupy this statutory status must assume ''the responsibility to act as a genuine representative of all the employees in the bargaining unit.'' . . . [S]ection 7 . . . gives employees the right to be free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment. This right of employees is a statutory limitation on statutory bargaining representatives, when acting in a statutory capacity, from taking action against any employee upon considerations or classifications which are irrelevant, invidious, or unfair.'' [140 NLRB at 185].

Accordingly, as the union's breach of its Section 9 authority in *Miranda Fuel* negatively affected employees' Section 7 rights, the union was found to have violated Section 8(b)(1)(A) and (2).[36]

Following its inception, the duty of fair representation has been applied in an increasing number of contexts. The duty, which extends to all unit employees—not merely union members[37]—applies to contract negotiation,[38] administration,[39] and enforcement.[40] The duty is also applicable to a union's operation of its hiring hall.[41]

Various union actions breach the duty of fair representation. For example, an exclusive representative breaches its duty where it affirmatively misleads unit employees about their obligations under the contract. *Armco, Inc. v. NLRB*, 832 F.2d 357, 364 (6th Cir. 1987). Similarly, a union violates the Act when it fails to warn employees about probable job loss consequences of their actions. Thus, in *Teamsters Local 860 v. NLRB*, 652 F.2d 1022, 1025 (D.C. Cir. 1981), a union failed to warn employees of the employer's threat to close their department if they persisted in their economic demands. The court found this omission arbitrary and in breach of the union's duty of fair representation.[42]

2. Fiduciary duty of unions

As the duty of fair representation has evolved, it has been refined as a legal doctrine. One refinement has been to analogize the union's duty to that of a fiduciary to its beneficiaries. As long ago as 1962, the Board recognized this similarity in *Miranda Fuel* when it stated that the ''requirement of fair dealing between a union and its members is in a sense fiduciary in nature.''[43] Since *Miranda Fuel*, the Board consistently has held that the union's unique position as exclusive bargaining representative carries with it the concomitant fiduciary duty to deal fairly with unit employees on all contract matters governing terms and conditions of employment. *Security Officers Local 40B (South Jersey Detective Agency)*, 260 NLRB 419, 420

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[34] 323 U.S. 192 (1944). See also *Wallace Corp. v. NLRB*, 323 U.S. 248 (1944).

[35] 140 NLRB 181 (1962), enf. denied 326 F.2d 172 (2d Cir. 1963).

[36] Although the Second Circuit Court of Appeals refused to enforce *Miranda Fuel*, that circuit and other courts of appeals subsequently held that a breach of the duty of fair representation violates the Act. See, e.g., *NLRB v. Teamsters Local 282 (Transit-Mix Concrete)*, 740 F.2d 141 (2d Cir. 1984); *Rubber Workers Local 12 (Goodyear Tire) v. NLRB*, 368 F.2d 12 (5th Cir. 1966), cert. denied 389 U.S. 837 (1967); *Newport News Shipbuilding Co. v. NLRB*, 631 F.2d 263, 269–270 (4th Cir. 1980); *Teamsters Local 568 (Red Ball) v. NLRB*, 379 F.2d 137, 141–142 (D.C. Cir. 1967).

[37] *Electrical Workers IBEW Local 2088 (Federal Electric)*, 218 NLRB 396 (1975).

[38] *Ford Motor Co. v. Huffman*, supra; *Steele v. Louisville & Nashville Railroad Co.*, supra.

[39] *Humphrey v. Moore*, supra.

[40] *Teamsters Local 391 v. Terry*, 494 U.S. 558 (1990); *Electrical Workers IBEW v. Foust*, 442 U.S. 42, 47 (1979).

[41] *Breininger v. Sheet Metal Workers*, 493 U.S. 67 (1989); *Boilermakers Local 374 v. NLRB*, 852 F.2d 1353 (D.C. Cir. 1988).

[42] See also *Electrical Workers IUE Local 801 v. NLRB*, 307 F.2d 679, 683 (D.C. Cir. 1962), cert. denied 371 U.S. 936 (failure to inform employees about union-security clause); *NLRB v. Postal Workers*, 618 F.2d 1249, 1255 (8th Cir. 1980) (failure to contact employee before revoking assent to shift change).

[43] 140 NLRB at 189, quoting *Electrical Workers IUE Local 801 v. NLRB*, supra, 307 F.2d at 683.

(1982).[44] Several circuit courts of appeals similarly have described the duty of fair representation in fiduciary terms.[45] Recent Supreme Court decisions have validated this comparison. In *Air Line Pilots v. O'Neill*, 113 L.Ed.2d 51, 62–63 (1991), the Court said:

> The duty of fair representation is thus akin to the duty owed by other fiduciaries to their beneficiaries. For example, some Members of the Court have analogized the duty a union owes to the employees it represents to the duty a trustee owes to trust beneficiaries. See *Teamsters Local 391 v. Terry*, 494 U.S. 558, [133 LRRM 2793] (1990); id., at ____ (Kennedy, J., dissenting). Others have likened the relationship between union and employee to that between attorney and client. See id., at ____ (Stevens, J., concurring in part and concurring in judgment). The fair representation duty also parallels the responsibilities of corporate officers and directors toward shareholders. Just as these fiduciaries owe their beneficiaries a duty of care as well as a duty of loyalty, a union owes employees a duty to represent them adequately as well as honestly and in good faith.

The basis for the ''fiduciary'' analogy is the union's comprehensive authority as exclusive bargaining representative, the cornerstone of representation under the Act. Because this comprehensive authority ''leads inevitably to employee dependence on the labor organization,''[46] the Board and courts require exclusive representatives to notify employees they represent of matters affecting their employment. See, e.g., *Teamsters Local 896 (Anheuser-Busch)*, 280 NLRB 565, 575 (1986).[47] As stated in *Electrical Workers IUE Local 801 v. NLRB*, supra, 307 F.2d at 683, ''[T]he union which can require [the employee's] membership or command his discharge is therefore charged with an obligation of fair dealing which includes the duty to inform the employee of his rights and obligations so that the employee may take all necessary steps to protect his job.'' The rationale for requiring the union to provide this information is that it, as the exclusive representative, must ensure that unit employees do not fail to meet their obligations through ''ignorance or inadvertence,'' but do so only as a result of conscious choice. *Conductron Corp.*, 183 NLRB 419, 426 (1970).[48]

Because of this fiduciary obligation, unions breach their duty of fair representation by failing to provide unit employees with requested contracts or fringe-benefit plans.[49] The Act similarly is violated where exclusive representatives fail to inform employees of contract interpretations or changes clearly affecting their terms and conditions of employment.[50] Further, unions that operate hiring halls violate Section 8(b)(1)(A) unless they inform employees of the halls' procedures and changes to those procedures, and provide requesting employees with hiring hall lists.[51] Moreover, in *Electrical Workers IBEW (Los Angeles NECA)*,[52] the Board termed the union's breach of the duty to apprise employees of their hiring hall obligations as a ''statutory'' responsibility. Finally, and particularly relevant to this case, the Board, with court approval, has determined that unions' fiduciary duties extend to the enforcement of union-security clauses.[53] Thus, when a union requires a new employee ''to perfect membership under a union security agreement, it has the duty to notify the employee . . . as to what his 'membership' obligations are.''[54] Obviously this duty requires that prior to seeking an employee's discharge for noncompliance with the union-security provision, the union must inform the employee of the nature and extent of the membership obligations—including dues requirements—and notify the employee that the union will seek his or her discharge unless these obligations are satisfied. *NLRB v. Hotel & Restaurant Employees Local 568 (Philadelphia Sheraton)*, 320 F.2d 254, 258 (3d Cir. 1963).

We recognize that *Philadelphia Sheraton* deals with a situation where the union is actually seeking the discharge of an employee for failure to comply with the union-security clause. Clearly, in that situation, the union must inform the employee as to the precise extent of the obligation. In our view, the union's obliga-

[44] See also *Philadelphia Sheraton Corp.*, 136 NLRB 888 (1962), enfd. sub nom. *NLRB v. Hotel & Restaurant Employees Local 568*, 320 F.2d 254, 258 (3d Cir. 1963); *Teamsters Local 13 (Mobile Pre-Mix)*, 268 NLRB 930 (1984); *Electrical Workers IBEW Local 3 (General Electric)*, 299 NLRB 995 (1990); *Operating Engineers Local 501 (California Milk)*, 306 NLRB 659 (1992).

[45] See, e.g., *NLRB v. Teamsters Local 282*, supra; *NLRB v. Hotel & Restaurant Employees Local 568*, supra.

[46] *NLRB v. Hotel & Restaurant Employees Local 568*, supra, 320 F.2d at 258.

[47] *Sheet Metal Workers Local 355 v. NLRB*, 716 F.2d 1249, 1254–1256 (9th Cir. 1983).

[48] See also *Operating Engineers Local 501 (California Milk)*, supra, 306 NLRB 659, supra.

[49] *Security Officers Local 40B*, supra.

[50] See, e.g., *Teamsters Local 896 (Anheuser-Busch)*, supra; *Teamsters Local 282 (Transit-Mix Concrete)*, 267 NLRB 1130, 1131 fn. 1 (1983), enfd. 740 F.2d 141 (2d Cir. 1984) (failure to inform employees of arbitrator's decision establishing recall rights); *Steelworkers (Duval Corp.)*, 243 NLRB 1157, 1158 (1979) (failure to apprise employees of negotiation of no-strike clause).

[51] *Boilermakers Local 374 v. NLRB*, supra, 852 F.2d at 1358; *Operating Engineers Local 406 v. NLRB*, 701 F.2d 504, 510 (5th Cir. 1983); *Teamsters Local 860 v. NLRB*, supra; *Bartenders Local 165 (Nevada Resort)*, 261 NLRB 420 (1982); *Operating Engineers Local 324 (Michigan Chapter, NECA)*, 226 NLRB 587 (1976).

[52] 270 NLRB 424, 426 (1984), enfd. 772 F.2d 571 (9th Cir. 1985).

[53] See, e.g., *Teamsters Local 270 (Bulk Transport)*, 186 NLRB 299, 301 (1970); *Bridge Workers Local 378 (Judston Steel)*, 192 NLRB 1069, 1074 (1971), enfd. mem. 80 LRRM 2627 (9th Cir. 1972).

[54] *Philadelphia Sheraton*, supra, 136 NLRB at 896.

tion is not limited to that situation. Under a union-security clause like that involved herein, employees would reasonably believe that full membership in good standing is required. If the employee, acting pursuant to that belief, retains such membership, the union would have no occasion to seek discharge, and thus a *Philadelphia Sheraton* case would not arise. However, there would nonetheless be a statutory evil, viz., the employee is kept under the erroneous impression that he/she does not have a Section 7 right to resign from the union. Accordingly, we believe that the union must apprise all unit employees, not just those who are faced with imminent discharge, as to the precise extent of their obligations and rights.

I. *The Respondents Breached Their Duty of Fair Representation*

As we have seen, the duty of fair representation has three aspects: (1) to serve all unit employees without hostility or discrimination; (2) to act in good faith and honesty; (3) to avoid arbitrary conduct. If a union fails in one or more of these three respects, it breaches the duty of fair representation. In our view, the Respondents have failed in the second respect.[55] The union-security clause is phrased in a way that would lead a reasonable employee to believe that full membership in good standing is required. Respondents failed to take any steps that would disabuse the employees of that belief. At stake were such vital matters as retention of employment and the Section 7 right to refrain from full membership. In these circumstances, the Respondents' conduct was inconsistent with elemental notions of good faith and honesty.

Applying the foregoing legal principles to the facts in this case, we find that that the Respondents violated Section 8(b)(1)(A) by maintaining a union-security clause requiring that unit employees become and remain ''members of the Union in good standing,'' without additionally informing employees of their *General Motors* rights.[56] Specifically, we find that the Respondents breached their fiduciary duty to Paramax employees by failing to inform them that their sole obligation under the union-security provision was to pay dues and fees.[57]

Initially, we note that the Respondents' duty to inform Paramax employees of their union-security obligations stems from the Respondents' status as exclusive representatives. Thus, as a consequence of the Respondents' comprehensive authority under Section 9(a) to exclusively represent Paramax unit employees, those employees necessarily depend on the Respondents to notify them of matters directly affecting their employment. *NLRB v. Hotel & Restaurant Employees Local 568 (Philadelphia Sheraton Corp.)*, supra. This need for notice is particularly acute where, as here, it: (1) involves conditions the represented employees must satisfy to retain their employment; (2) these conditions were negotiated by the Respondents; and (3) the conditions imposed by the clause inure to the Respondents' benefit. Because these exclusive representatives negotiated the union-security provision on behalf of the Paramax employees they represent, and are the direct beneficiaries of the dues and fees exacted under this provision, they logically and fairly bear the burden of informing employees of their obligations. Additionally, we find that the fiduciary duty to provide notice attaches because the union-security clause, by its nature, restricts the unit employees' exercise of fundamental Section 7 rights.

Under Section 7, employees have the concomitant rights to ''form, join, or assist labor organizations,'' and ''to refrain from any or all such activities . . . '' Although a recognized limitation on employees' statutory Section 7 rights are ''agreement[s] requiring membership under Section 8(a)(3)'', the actual scope

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[55] Cf. *Communications Workers v. Beck*, supra, 487 U.S. at 743 (1988) (reliance on union's ''failure to represent . . . interests fairly and without hostility'').

[56] As previously indicated, this case does not present the issue whether the Respondents additionally were required to notify unit employees of their options under *Beck*.

[57] As set forth above, the General Counsel's primary argument was that the union-security clause was unlawful on its face. Alternatively, the General Counsel argued that the clause was ambiguous and that the Respondent was therefore obligated to provide information to employees as to the true meaning of the clause. As discussed above, we agree with the latter argument. As to that argument, our dissenting colleague contends that the General Counsel did not establish the fact that Respondent failed to inform the employees. *However, the Respondent itself never made that argument*. Instead, Respondent chose to make only the legal argument that it had no obligation to inform the employees. Accordingly, we need not reach the issue of whether the General Counsel has the burden of proving an absence of information, or, conversely, the Respondent has the burden of proving that it gave the information. However, we suggest, without deciding, that it may not be unreasonable to place on Respondent the burden of proving that it gave the information since it is the party most likely to have the evidence on this point.

With respect to our dissenting colleague's inference that the Respondent had sufficiently informed the unit employees, we note the following. He infers from testimony in another case now pending, *Paramax Systems Corp*., 29–CB–8055, that the Respondents provided unit employees information regarding the meaning of obligations under the union-security clause. We find this inference unsupported. First, the testimony on which our colleague relies concerns a newspaper from the Respondent International Union informing employees of the procedures for seeking a dues reduction under *Communications Workers v. Beck*. This newspaper is directed to all employees represented by the International, covered under a myriad of collective-bargaining agreements, not just Paramax unit employees. Additionally, the newspaper merely informs ''agency shop fee payers and certain nonmember payers'' of their *Beck* rights. It is not addressed to employees who are ''members'' of the Union in good standing pursuant to the contract's union-security clause and are not aware of their rights under law. Also there is no evidence alluded to by our colleague in this case or in Case 29–CB–8055 that either of the Respondents ever apprised unit employees that, under *General Motors*, the only lawful condition to their continued employment was the payment of initiation fees and dues.

of the limitation is quite circumscribed. Thus, Congress' strong concern when enacting Section 8(a)(3) was to safeguard employees' Section 7 right to refrain from union activity without jeopardizing their employment. *Union Starch*, supra. The Board and the courts have interpreted Section 8(a)(3) consonant with Congress' intent. We both consistently have held that ''agreement[s] requiring membership,'' (i.e., union-security provisions), require only that unit employees, as a condition of employment, tender uniform initiation fees and dues. *General Motors*, supra.

The permissible limits of the union-security obligation under Section 8(a)(3) are not reasonably and fairly reflected in the Paramax union-security agreement. On the contrary, the contractual language requiring that unit employees become and remain ''members of the Union in good standing,'' is ambiguous and fails to apprise employees of the lawful limits of their obligation. Indeed, a literal reading of the clause would lead an employee unversed in labor law to believe that employees were obliged to join the Union and satisfy all of the requirements for membership as a condition of employment. This literal reading of the clause would chill the exercise of employees' Section 7 rights to refrain from union membership and support.

Because the clause is ambiguous, and directly implicates employees' fundamental statutory rights, the Respondents are obligated to tell employees what the clause actually requires. See, e.g., *Electrical Workers IBEW Local 2088 (Lockheed Space)*, supra. By failing to inform unit employees of their obligations, the Respondents breached their fiduciary duty of fair dealing in violation of Section 8(b)(1)(A).

The Respondent International Union affirmatively argues that the Act is not violated because, among other things, the General Counsel maintained as recently as April 1991, that *General Motors*, *Beck*, and *Pattern Makers* rights need not be enumerated in a union-security clause for that clause to be facially valid, and no subsequent case requires a different result. We reject this argument. First, the position of the General Counsel on which the Respondent relies is advisory, and lacks the force of law. Second, we are not finding the Paramax union-security clause facially invalid. Rather, because ''member[ship in] the Union in good standing'' is ambiguous but chills employees' exercise of Section 7 rights, we are requiring the Respondents to tell employees what the clause actually means.

Finally, although not argued by the parties, we find nothing inconsistent with our requirement that the Respondents notify unit employees of their *General Motors* rights, and the holding in *Teamsters Local 357 v. NLRB*, supra. Thus, although the Supreme Court held in *Teamsters Local 357*, a hiring hall case, that the Board exceeds its 10(c) remedial authority by requiring prophylactic safeguards, *Teamsters Local 357* was not a duty of fair representation case.[58] Indeed, it arose prior to the Board's application of that doctrine. Further, in the hiring hall context in *Teamsters Local 357*, employees were not required to initiate any communication with their exclusive representative in order to perfect their statutory rights. Here, however, before employees can exercise their statutory rights, they must be informed of the actual extent of their obligation under the union-security clause. In these circumstances, the notice the Respondents are required to provide is remedial, not prophylactic. Further, *Teamsters Local 357* does not deal with a clause which impairs Section 7 rights. By contrast, a union-security clause does impair Section 7 rights. As we have seen, such impairment is permissible, provided that the impairment is narrowly confined to the obligation to pay dues and fees. In our view, where a union is given the privilege of impairing Section 7 rights to a limited extent, the union has the concomitant obligation to explain the precise limits of that impairment.

J. *The 8(b)(2) Allegation*

The General Counsel next argues that because the union-security clause is facially unlawful, it also violates Section 8(b)(2). We disagree. As previously discussed, we find the contested union-security clause ambiguous rather than facially invalid. Second, even were the clause unlawful, Section 8(b)(2) is not implicated. Under settled Board law, a union violates Section 8(b)(2) only where it takes affirmative steps to cause, or attempt to cause, an employer to discriminate against employees in violation of Section 8(a)(3). *Electrical Workers IBEW Local 2088 (Lockheed Space)*, supra, 302 NLRB at 330.[59] As the Respondents have merely maintained an ambiguous union-security clause, and have not caused, or attempted to cause, Paramax to violate Section 8(a)(3), Section 8(b)(2) is not violated. Accordingly, we dismiss this allegation.[60]

III. KEYSTONE OVERRULED AS TO THE MODEL CLAUSE

Because we have found that the phrase ''membership in good standing'' is ambiguous, we specifically reject the model clause in *Keystone* which contains this provision.

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[58] *Breininger v. Sheet Metal Workers Local 6*, supra, 493 U.S. at 89.

[59] Compare *Typographical Union 16 (Continental Composition)*, 268 NLRB 347, 348–349 (1983) (Sec. 8(b)(2) violated where union caused or attempted to cause employer to discharge employees for failing to comply with unlawful union-security clause).

[60] Member Raudabaugh does not agree with the second reason for dismissing the 8(b)(2) allegation. If a union-security clause is unlawful on its face, the mere maintenance of it violates Sec. 8(b)(2) and 8(b)(1)(A). See *J. W. Bateson*, supra.

IV. RETROACTIVITY

The final issue we confront is whether, as the General Counsel argues, the foregoing principles should be retroactively applied. The Board's customary practice is to apply new policies and standards to ''all pending cases at whatever stage.'' *Deluxe Metal Furniture Co*., 121 NLRB 995, 1006–1007 (1958). An exception to this practice occurs where retroactive application would work a ''manifest injustice.'' *Pattern Makers (Rite Industrial Model)*, 310 NLRB 929 (1993).[61] As stated in *SEC v. Chenery*, supra, 332 U.S. at 203, the propriety of retroactive application is determined by balancing the ill effects it might produce with the ''mischief of producing a result which is contrary to a statutory design of the legal and equitable principles.''[62] Applying this balancing process, we agree with the General Counsel that retroactive application is appropriate.

Although the principles enunciated in today's decision depart from precedent, they are necessary to reconcile apparent inconsistencies in the previous law, and to eliminate widespread confusion among employees, employers, and unions about rights and obligations accruing under union-security provisions. Second, although these new principles place new obligations on unions, we do not view these obligations as onerous or as working an injustice. The additional obligations on unions to cure ambiguities in union-security clauses by accurately apprising unit employees of their rights and obligations under *NLRB v. General Motors*, easily can be satisfied by adequate notice or by revising union security agreements. Moreover, as envisioned by *Chenery*, counterbalancing interests clearly establish the propriety of retroactive application. Thus, ''the purpose of Section 8(b)(1)(A) . . . is to protect employees from union coercion directed at their exercise of Section 7 rights; and . . . an important policy of the Act is the principle of voluntary unionism.'' *Pattern Makers (Rite Industrial Model)*, supra. Retroactive application furthers this policy of voluntary unionism by ensuring that employees are apprised of, and free to exercise, their statutory rights and options under contractual union-security provisions. And, indeed, there is little in the way of ''ill effects'' that we perceive to justify a failure to make our decision retroactive, for the membership requirement could not in any event be enforced beyond its lawful limit.

In sum, we conclude that the statutory benefits to employees outweigh the hardships resulting from immediate imposition of today's principles. Accordingly, we will apply these principles to this case and to all pending cases at whatever stage.

[61] *NLRB v. Bufco Corp*., 899 F.2d 608, 609 (7th Cir. 1990); *NLRB v. Chicago Marine Containers*, 745 F.2d 493, 499 (7th Cir. 1984).

[62] See also *NLRB v. Bell Aerospace Co*., 416 U.S. 267, 294 (1974); *NLRB v. Niagara Machine*, 746 F.2d 143, 151 (2d Cir. 1984); *John Deklewa & Sons*, 282 NLRB 1375 (1987), enfd. 843 F.2d 770 (3d Cir. 1988).

CONCLUSIONS OF LAW

1. Paramax Systems Corporation is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO, and its Engineers Union, Local 444 are labor organizations within the meaning of Section 2(5) of the Act.

3. By maintaining and giving effect to a union-security clause requiring that employees, as a condition of employment, become and remain ''members of the Union in good standing,'' without apprising unit employees that under *NLRB v. General Motors* they need only tender to the Respondents uniform initiation fees (if applicable) and dues, the Respondents have engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(A) of the Act.

4. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondents violated Section 8(b)(1)(A), we shall order that they cease and desist and take certain affirmative action designed to effectuate the policies of the Act. Specifically, the Respondents are required to notify each unit employee, in writing, of the employee's *General Motors* rights. Nothing here shall preclude the Respondents from negotiating a modification to the union-security provision with Paramax Systems Corporation which unambiguously apprises unit employees of their lawful union-security obligations.[63]

ORDER

The National Labor Relations Board orders that the Respondents, International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO, and its Engineers Union, Local 444, their officers, agents, and representatives, shall

1. Cease and desist from

(a) Maintaining a union-security clause requiring that, as a condition of employment, Paramax unit employees become and remain ''members of the Union in good standing'' without informing those employees that they are only obligated to tender uniform initiation fees (if any) and dues.

(b) In any like or related manner restraining or coercing Paramax employees in the exercise of their rights protected by Section 7 of the Act.

[63] Because we have determined that the union-security clause is not facially unlawful, we deny the Charging Party's request that the clause be rescinded.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Notify each Paramax unit employee in writing that the only required condition of employment under the union-security clause is the tendering of uniform initiation fees (if any) and dues.

(b) Post at their business offices and all meeting halls copies of the attached notice marked ''Appendix.''[64] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondents' authorized representatives, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Sign and return to the Regional Director sufficient copies of the notice for posting by Paramax Systems Corporation, if willing, at all places where notices to employees are customarily posted.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondents have taken to comply.

MEMBER DEVANEY, dissenting in part.

1. Introduction

I dissent from the majority's finding that the Union[1] violated Section 8(b)(1)(A) and the duty of fair representation by maintaining an ''ambiguous'' union-security clause requiring that unit employees remain members of the Union ''in good standing'' without clarifying the clause's meaning under *NLRB v. General Motors*,[2] and I dissent from the order that the Union notify each employee in writing that ''the only required condition of employment under the union-security clause is the tendering of uniform initiation fees (if any) and dues.''

I would adopt the judge's dismissal of the complaint. I find that the Union's maintenance of a union-security clause in conformity with Board law, found facially lawful by the majority itself, does not breach the duty to represent employees in good faith. The record discloses that the Union has represented the Charging Party fairly at all relevant times, and the maintenance of the very provision alleged as unlawful demonstrates beyond doubt that the Union has adhered to the law respecting the limits on union-security clauses at all times.

I view the majority's conclusion as a heavy-handed effort to impose a partisan notion of what labor laws *ought* to require from unions rather than a careful application of what the law *does* require. The majority misapplies Supreme Court precedent defining the standard for breaches of the duty of fair representation in violation of Section 8(b)(1)(A). Under that standard, only arbitrary, discriminatory, or bad-faith conduct breaches the duty.[3] Further, precedent emphasizes the limits on judicial and administrative review of a union's choices as to how it carries out its duties and exercises its rights under law as a bargaining representative, and it mandates a standard of broad reasonableness and consideration of the factual and legal climate in which the union acted. My colleagues pay lip-service to this standard, which is clear, definite, and limited to situations of real dereliction, but they do not apply it to this case. Instead, emphasizing analogies between the duty of fair representation and the law of fiduciaries, they treat the duty as a conveniently hazy ''fiduciary'' responsibility to please everyone all the time and to anticipate any and all changes in the law. I have found no other case not later reversed in which a union's strict adherence to Board law forms the basis for a violation of Section 8(b)(1)(A).[4]

As to the violation's factual basis, I disagree with my colleagues' failure to require the General Counsel to provide a factual underpinning for the majority's theory of the violation.[5] The General Counsel failed to

[64] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

[1] The unit employees are represented by the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO, and its Engineers Local 444. The judge found that both entities were served as Respondents here. For simplicity's sake, I shall refer to these entities as ''the Union.''

[2] 373 U.S. 734 (1963).

I agree with my colleagues that the Union's conduct did not violate Sec. 8(b)(2) and I further agree that the General Counsel's supplemental brief is acceptable.

[3] *Vaca v. Sipes*, 386 U.S. 171 (1967); *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953).

[4] In this I echo Member Murdock's forceful, well-reasoned, and ultimately persuasive dissent in *Mountain Pacific Chapter, AGC*, 119 NLRB 888, 890 (1957), overruled in relevant part *Teamsters Local 357 v. NLRB*, 365 U. S. 667 (1961) (Murdock, dissenting in relevant part: ''To my knowledge this is the first time that the Board or any court has found an unfair labor practice solely on the ground that the respondent failed to express a lawful motivation at the time the alleged unfair labor practice occurred.'')

[5] The majority reads the complaint allegations and the General Counsel's exceptions and brief in support of them as arguing in the alternative that the union-security provision was ambiguous and that the Respondents were therefore obligated to provide notice of its true meaning to employees. I see no evidence in either the complaint or the brief in support of exceptions to indicate that the General Counsel was arguing that the Respondent could satisfy that obligation in any manner other than revising the union-security provision. I read the complaint and brief as alleging only that the union-security agreement violated the Act because it did not state that employees are obligated to pay only initiation fees and dues.

The majority's broad reading of the complaint and pleadings does not alter the reality that it does not have an evidentiary showing to support a key fact vital to its finding of the violation. If the General

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adduce any evidence of the two key facts on which the majority's conclusions depend: that confusion about the nature of the union-security obligation exists and that the Union failed to apprise employees of the maximum that such a provision can require. The majority has in effect relieved the General Counsel of his statutory responsibility to demonstrate that a respondent has violated the Act: by *presuming*, on the basis of a lawful provision, that the Union will mislead employees, the majority shifts the burden of proof to the Union; and by finding the presumption conclusive of unlawful conduct even without proof that the Union failed to notify employees of their minimum obligations, the majority has reduced the General Counsel's burden to alleging nothing more than that a union-security clause contains the phrase ''in good standing.'' As the majority holds today that this phrase does not render a union-security agreement unlawful, the General Counsel has no burden to come forward with evidence of unlawful conduct.[6]

To fill the vacuum of the General Counsel's case, the majority reaches into past decades for outdated commentary to support findings, not about *this* Respondent and *this* unit, but about ''average'' employees in ''widespread'' situations. This substitution of generality for fact abuses the presumption that the NLRB is ''one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings . . . carry the authority of [] expertness.''[7] Such findings of ''fact'' merit no deference whatever, as they openly rely on incompetent and irrelevant sources.

I emphasize that the *majority*, not I, has chosen to base its conclusion that the Union has violated the Act on the subjective confusion of some employees: as the majority states, ''[i]t is because of this confusion that we examine the instant union-security clause . . . .'' I do not follow that approach; I merely observe that if the majority relies on the premise that employees' subjective response to contract language is confusion, then the majority should cite relevant, competent evidence that employees are responding to the language with confusion to support (1) a finding that such confusion exists and that the Union has not alleviated it, (2) an inference that the confusion is widespread, and (3) a conclusion that the Board should order a remedy. The majority has failed to cite any such evidence.[8]

My colleagues' zeal to fix something that is not broken is also reflected in the cavalier order that because an employee *could misunderstand* the union-security clause, the Union must undertake an extensive, expensive, and thoroughly redundant notification campaign. The order stretches the Board's discretion in fashioning appropriate remedies too far, as it ignores the real-world consequences—the simultaneous expense and futility—of complying with such a requirement.

Finally, Supreme Court precedent unequivocally holds that the Board lacks the authority under Section 8(a)(3) and Section 8(b) to find a violation and under Section 10(c)[9] to order a remedy where the Board has simply presumed wrongdoing from contract language that admits of a lawful interpretation.[10] My colleagues' holding that while the language here is facially lawful, it is ''confusing'' or ''ambiguous'' and thus requires a remedy fails to put them on solid statutory ground. The Supreme Court has not established either of those

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Counsel were to argue that the Respondents were obligated to notify unit employees of the meaning of ''in good standing,'' the General Counsel would still have to show as part of the prima facie case that the Respondents failed to do so. This is equally true in, e.g., an 8(a)(5) case where the complaint alleges that the respondent failed to execute an agreement. Before the respondent can be required to demonstrate that it did execute the agreement, the General Counsel must come forward with evidence that the respondent did not do so. If the General Counsel fails to adduce evidence of such operative facts, the complaint will be dismissed before the respondent is required to demonstrate that it did execute the agreement. The same allocation of the burden of proof should apply here.

Thus, my colleagues' emphasis on the Respondent's failure to demonstrate that they gave notice to employees of the meaning of the union-security provision is misplaced. Requiring a union to come forward with evidence that it had in fact separately notified employees of their rights under a union-security clause would indeed be appropriate—as part of a respondent's *rebuttal* of the General Counsel's prima facie case. But contrary to the majority, the General Counsel did not allege that the Union violated the Act by maintaining an ambiguous clause and failing to give employees notice of their rights—and even if he did, he introduced no evidence that the Union had failed to give such notice. The Respondents, then, can hardly be faulted for failing to plead an affirmative defense to a violation the operative facts of which were not even alleged and in support of which no evidence was adduced. In addition, the Union's knowledge with respect to notification is not exclusively in its possession; the General Counsel could quickly ascertain through investigation of the charge whether he could establish a prima facie case for maintenance of an ambiguous union-security clause without clarification by asking the charging party and other employees if they had ever received such a notice.

[6] See *Mountain Pacific*, supra, fn. 4, 119 NLRB 883, 888–889 (Murdock, dissenting in part).

[7] *Universal Camera Corp. v. NLRB*, 334 U.S. 474, 488 (1950).

[8] As discussed in sec. 5, infra, the standard for determining the lawfulness of the language at issue is not whether it confuses or enlightens employees, or even, as my colleagues appear to hold elsewhere, whether a reasonable employee would find the language ambiguous, but is set out by the Supreme Court in *NLRB v. News Syndicate Co.*, 365 U.S. 694 (1961): does the provision, on its face, call for illegal conduct by one or both of the parties? For ''[i]n the absence of provisions calling explicitly for illegal conduct, the contract cannot be held illegal because it failed affirmatively to disclaim all illegal objectives.'' Id. at 699–700 (citation omitted).

[9] Sec. 10(c) provides, in relevant part:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint *has engaged in or is engaging in any such unfair labor practice*, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action . . . as will effectuate the policies of this Act . . . . [Emphasis added.]

[10] *NLRB v. News Syndicate Co.*, supra, fn. 8, 365 U.S. 694.

characteristics as the threshold for an order that a union remedy problematic contract language; thus, my colleagues exceed their authority by ordering a remedy when no unlawful conduct has occurred and by holding the Union to a standard rejected definitively by the Supreme Court. As discussed in section 4, infra, there is no better demonstration of the Court's wisdom in prohibiting the Board from ''legislating'' where Congress is silent than my colleagues' basing a violation and remedy on scrupulous adherence to Board law.[11]

2. The case below

Charging Party Ferriso is a nonmember *Beck* objector. The General Counsel has offered no evidence that the Union has threatened or retaliated against him or any other nonmember or that any employee was confused or misled by the parties' union-security provision, or that the Union has responded to any inquiries about employees' obligations in a confusing manner.

The facts are not disputed. For about 25 years the Union has represented a unit of engineering and quality control employees and has negotiated contracts, each of which, including the most recent,[12] has provided that all unit employees ''shall join the Union by the thirtieth day and continue to remain members of the Union *in good standing* . . . as a term and condition of employment.'' During the two most recent contracts, Paramax has deducted dues from all employees who have authorized checkoff and has remitted the dues to Local 444, which in turn has remitted a portion to district and international organizations. The record shows that the Union has not attempted to enforce the clause within memory, and at the very least not during the past two contract terms.

That ends the recitation of facts. The phrase ''in good standing'' is the only conduct alleged as unlawful. The General Counsel alleges that the Union violated Section 8(b)(1)(A) and (2) by maintaining a union-security clause that fails to state that the only condition of continued employment of the employees is the payment of initiation fees and dues. I would add a further fact, noted in the General Counsel's brief in support of exceptions at page 6, about the Union's handling of notice to employees of their union-security obligations: the International Union provides information to employees regarding their rights under *Communications Workers v. Beck*,[13] viz, that nonmembers have the right to pay reduced dues and fees if they object to the Union's nonrepresentational expenditures.[14] The Union, then, has provided information regarding the meaning of obligations under the union-security clause to the unit employees during the relevant period and before it.

On these facts, the General Counsel argues that the union-security clause's phrasing—that employees are required to maintain membership ''in good standing''—is facially invalid under *General Motors* and *Beck*,[15] because it does not state explicitly that employees need pay only dues and initiation fees as a condition of employment. The General Counsel argues that the Union has violated its duty of fair representation to unit employees, and that to remedy the breach, the Union must (1) refrain from misleading or confusing employees into believing that their union-security obligations are broader than the law allows; and (2) to eliminate any confusion employees have about their obligation.

The judge dismissed the complaint, finding that the provision is lawful because it tracks the Board's union-security clause language in *Keystone*.[16] In response to the General Counsel's argument that *Paragon Products Corp*.[17] overruled *Keystone*, the judge correctly noted that *Paragon* overruled, not the clause's language, but *Keystone*'s presumption that union-security clauses that do not track Section 8(a)(3)'s language are unlawful, and that the *Keystone* language is still viable.[18] In re-

[11] *Teamsters Local 357 v. NLRB*, supra, fn. 4, 365 U.S. 667.

[12] This agreement is effective by its terms from September 25, 1991, to February 3, 1995. Emphasis in the quotation from the agreement's provision is added.

[13] 487 U.S. 735 (1988).

[14] See *Paramax Systems Corp*., 29–CB–8055, involving the same parties. Ferriso testified there that he read of the nonmember's option to pay reduced dues in notices provided by the Local and International. These notices were published in the Union's periodical; it thus appears safe to infer that members also received the periodical and the notice.

The majority states that I inferred from Ferriso's testimony in the companion case that the Union had provided, through its *Beck* information, some notice to employees of their rights under a union-security clause. That testimony formed part of the basis of my inference; I also based the inference on the General Counsel's reference to the notice in the brief in support of exceptions filed in the instant case. My inference that members would receive the *Beck* notice, which describes the rights of *nonmembers* to seek a dues reduction, because it was published in a magazine sent to all members, has a basis in fact. That cannot be said of the majority's inference that the Union permitted confusion over employee rights under the union-security clause to persist by failing to apprise members of their rights.

[15] My colleagues have correctly noted that no additional rights that *Beck* may guarantee to employees are implicated here.

[16] *Keystone Coat, Apron, & Towel Co*., 121 NLRB 880 (1958). In *Keystone*, the Board held that a union-security clause not reflecting the language of Sec. 8(a)(3) would not bar a petition, and while commenting that ''it should not be difficult for parties . . . to adhere to the statutory requirements set out by Congress eleven years ago,'' it set out a provision ''offered as a guide'' and deemed to be the ''maximum permissible *in conformity with the requirements of the Act*.'' Id. at 885 (emphasis added). As noted above, the model clause permits unions to require the maintenance of ''membership in the Union in good standing.''

[17] 134 NLRB 662 (1961).

[18] The judge's interpretation of *Paragon* and *Keystone* is unquestionably correct. In *Paragon*, the Board found that sound administrative practice foreclosed continuing to find union-security clauses not conforming to Sec. 8(a)(3)'s language unlawful, because: (1) the Supreme Court had sharply criticized such presumptions of unlawfulness (see discussion of *NLRB v. News Syndicate Co*., supra, fn. 8,

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sponse to the General Counsel's argument that if *Keystone*'s clause is good law after *Paragon*, then *Keystone* is wrongly decided because the phrase ''in good standing'' does not track Section 8(a)(3)'s language precisely, the judge reasoned that the General Counsel was seeking the very conclusion *Paragon* condemned—that a union-security clause not unlawful on its face and not used to gain unlawful ends is illegal nonetheless. Finally, the judge concluded that Board law does not require parties to conform the wording of union-security clauses to evolving case law; in this case, as the union-security clause's language followed the *Keystone* model, maintenance of it did not violate the law. I agree with the judge's reasoning.

Although the General Counsel concedes in exceptions that the clause here does not mandate unlawful conduct, he urges the Board to strike it rather than construe it lawfully, as, in his view, membership ''in good standing'' clearly requires more from an employee than just ''membership.'' The General Counsel argues further that although ''employee[s] . . . intimately familiar'' with Section 7 rights understand that they can be dues-paying nonmembers in, as the General Counsel inaccurately puts it, Paramax's ''union shop,'' the ''typical uninformed employee'' would ''readily'' interpret ''membership in good standing'' to require full membership, paid up in all respects.

3. The majority's analysis

In finding that the Union violated Section 8(b)(1)(A), the majority surveys the union-security clause from 1935 through *Beck*, noting that the trend in Congress, the Supreme Court, and the Board has been, since the closed shop was outlawed in 1947, toward voluntary unionism and the principle that the ''membership'' that can be required under Section 8(a)(3) is a financial obligation, narrowed still further in *Beck* to enable employees to object to and be relieved of paying dues expended for nonrepresentational purposes. I agree with these observations.

When the majority goes further, however, I part company with it. The majority finds the union-security area fraught with confusion. It criticizes Section 8(a)(3)'s language for failing to apprise employees of their rights, and it finds, as a factual matter, that employees do not know these rights, and that the empirical evidence of confusion moves it to examine the clause in this case. The majority cites a 1981 article[19] for its finding that unions and employers ''frequently'' fail to inform employees of their rights,[20] with the effect, noted in 1983, that the ''average'' unionized employee ''may well'' not understand the obligation the union-security clause imposes. The ''average'' employee's lack of understanding is ''widespread''; the majority quotes articles published in 1983, 1977, and 1976 as authority for this finding.[21] None of these articles provides any supporting data for these conclusions. Thus, the ''confusion'' that prompted the majority to create a new unfair labor practice was observed most recently over a decade ago.

Assuming for argument's sake that subjective employee response is an appropriate ground for determining whether the clause here is deficient enough to require a notice remedy, which I do not concede, a sounder procedure is to examine the General Counsel's factual showing to determine whether unit employees at Paramax were confused or misled about their union-security obligations or whether the Union had been using the contract language to attain unlawful ends, and whether, if such confusion existed, the Union had acted to clarify the matter. As the General Counsel has failed to present the testimony of even one employee that such confusion exists or any other evidence of confusion or misinformation, I would find that the record is devoid of evidence to support an inference that such confusion exists in the Paramax bargaining unit, much less that it is widespread.[22] Further, the General Counsel has not introduced evidence that the Union has failed to notify employees of their right to become nonmembers, so that, even if such confusion existed, there is no evidence to support an inference that the Union permitted it to persist.

The entire factual basis for the majority's holding, then, is the opinion, 10 to 17 years old, of individuals whose unstated credentials, points of view, research methods, and possible biases render reliance on their assertions, without further foundation, unacceptable under the most minimal standards of evidence. But, as these individuals commented on an industrial climate and a state of law quite different from today's, their observations are totally irrelevant to the resolution of the issues here: whether the Board has the authority to find an unfair labor practice on the basis of the maintenance of a facially lawful contract clause and, if so, whether the Union acted unreasonably, arbitrarily, or

365 U.S. 695, sec. 4, infra); (2) *Keystone*'s rigidity had an ''extremely unsettling impact'' on lawful union-security clauses, disrupting an inordinate number of contracts; and (3) many contracts illegal under *Keystone* did not, without extraneous evidence of intent and practice, provide a basis for finding an unfair labor practice. 134 NLRB 662, 664–665. Accordingly, the Board reversed only *Keystone*'s presumption that clauses with language differing from the statute or the model clause were unlawful and held that only clauses that facially require unlawful acts will bar elections.

[19] See majority decision, fn. 26.

[20] See id. at 1037.

[21] See id. at 1037 and fn. 29.

[22] My analysis is not intended to rule out the Board's consideration of, or judicial notice of, expert testimony or evidence or scholarly articles. However, I would require that such evidence be accompanied by a proper foundation and be relevant and material. That is not the case here.

in bad faith in maintaining the lawful contract provision.[23]

My colleagues next reject the General Counsel's argument that the union-security clause is per se unlawful, finding that it can be interpreted as requiring that employees remain paid up in fees and dues. I join them in this interpretation of the language and, in my view, the Board's authority to review the contract language, absent evidence that it has been used to gain unlawful purposes, ends here. But again my colleagues go further, and again I cannot follow them. They find that the phrase ''in good standing'' renders the clause ambiguous, because it could be interpreted to require more than remaining paid up in fees and dues; in fact, it is ''likely'' that employees will interpret the phrase as requiring full union membership, with all its rights and obligations; ''at a minimum, they will be confused.'' This ambiguity, the majority concludes, demonstrates that the Union has acted in bad faith by maintaining an ambiguous clause without ''taking steps'' to clarify an employee's right to resign from membership.[24]

To find this bad faith, the majority turns to the union's duty of fair representation, its origins, its application to employees represented under the NLRA, the Board's adoption of it, and its gradual extension, by the courts as well as by the Board, to many areas of representation. The majority notes that the duty has been described as akin to a ''fiduciary'' obligation and concludes that the Supreme Court has ''validated'' the comparability of the duty to a fiduciary responsibility, and cites cases holding that, where a union has special knowledge with respect to terms and conditions of employment that is vital to employees, it has a duty to notify employees thereof.[25] Finally, the majority moves from holdings that, e.g., a union must inform a delinquent employee of the exact amount owed and how it was calculated when seeking discharge or that a union must inform employees when hiring hall procedures change, to extend the duty to inform to the circumstances here, where the General Counsel has shown no prejudice to any employee, where the union has no unique access to the information respecting an aspect of the employees' terms and conditions of employment, and where there is no showing that the union has failed to provide the information to employees. Conceding that the rule that unions must inform employees of the exact amount of their arrearages before seeking discharge is based on radically different facts than those here,[26] the majority nonetheless reasons that maintenance of the clause here involves a ''statutory evil'': ''the employee is kept under the erroneous notion that he/she does not have a Section 7 right to resign from the union,'' and accordingly the Union must apprise all employees, not just those faced with discharge, of the ''precise extent of their obligations and rights.'' This reasoning is a flawless example of the Board's ''legislation through wishful thinking'' condemned by the Supreme Court, and I agree with the judge that such a result has the precise effect condemned in *Paragon Products*: a facially lawful contract provision that has not been the basis for any unlawful conduct is, somehow, unlawful.

4. Does the Board have the authority to order a union to provide notice to employees of statutory rights based on the maintenance of a facially lawful contract provision?

Before reaching whether the majority's holding squares with binding precedent on the duty of fair representation, which it does not, I find that Supreme Court precedent has foreclosed the Board from ''legislating'' where Congress has not acted by ordering remedies where the General Counsel has not shown that conduct prohibited by the statute has occurred, simply because, in the view of of a particular Board majority, such an order would increase employee understanding of Section 7 rights, or, in the majority's words, get rid of ''statutory evils.'' In *Teamsters Local 357 v.*

[23] To be sure, my colleagues find, in addition to the factual confusion, that employees would ''reasonably believe that full membership in good standing is required.'' But this observation does not result from the application of an objective standard of reasonableness, and appears to be no more than a variation of the finding that average employees are confused and that the confusion is widespread. Again, in any event, even if the majority were applying a ''reasonable interpretation'' standard, that standard would still be erroneous, as the standard for Board intervention is not reasonable clarity but facial unlawfulness.

[24] As noted above, however, no evidence has been adduced that the Union failed to clarify the minimum union-security obligation, and the record evidence tends to indicate that the Union had in fact done so. Further, my colleagues reaffirm the lawfulness of the language at issue today. Thus, no basis in either fact or law exists for the majority's conclusion that the Union acted in bad faith.

[25] I note that in the cases cited by the majority, an employee suffered some loss because of the union's failure to provide information in the union's possession. Such prejudice to an employee has not been shown here.

[26] One among the many crucial distinctions between cases in which unions seek discharge for failure to meet union-security obligations and this case is that in the discharge cases the violation is based on a showing that the union failed to inform the employee how much is owed or how it was calculated. By contrast, there is no showing in this case that the Union failed to inform unit employees of the right to be a nonmember fee-payer. Compare *Philadelphia Sheraton Corp.*, 136 NLRB 888, 896 (1962), enfd. 320 F.2d 254 (3d Cir. 1963) (''The parties herein had a [] lawful union-security agreement, and pursuant thereto could lawfully require [employees] to tender the dues . . . but for one fatal deficiency—*at no time was either man told the amount of his dues or when such payments were to be made*'' (emphasis in original)) with the General Counsel's Brief in Support of Exceptions at 6 (Charging Party Ferriso received Respondent International's notice regarding *Beck* rights). Supra at 1045.

NLRB,[27] the Court overturned the Board's requirement that a union post a notice to employees of their statutory rights as a condition of operating a hiring hall. The Board held that agreements to hire employees through hiring halls, by their very existence, tend to coerce employees to become union members in violation of their right, under Section 8(a)(3), to be free of discrimination that encourages union membership, and that it was necessary to assure that employees know their rights so that they could exercise them.

In reversing the Board, the Court candidly recognized that hiring halls do encourage union membership and might benefit from further regulation and that employees do not always fully understand their statutory rights. But the Court flatly rejected the Board's effort to assure that employees knew those rights. The Court reasoned that Congress, not the Board, has the authority to close gaps in the Act and that ''where Congress has adopted a selective system for dealing with evils, *the Board is confined to that system*. . . . [T]he Board cannot go further than Congress and establish a broader, more pervasive regulatory scheme.''[28]

The Court spoke in no uncertain terms. Where Congress has not regulated conduct, the Board must keep its hands off, even if it does not like what unions are doing. The perfect fit between *Teamsters Local 357* and this case is just as plain as the Court's language. As in *Mountain Pacific*, my colleagues assume that facially lawful contract language—here the phrase ''in good standing'' and in *Mountain Pacific* the provision that hiring would be routed through a union-run hiring hall—carries a risk that employees will not fully understand the language and consequently may not take advantage of their right to refrain from union activities, here by resigning from the Union if they wish and in *Mountain Pacific* by continuing to seek jobs through the hiring hall without joining the union. In this case, as in the reversed *Mountain Pacific*, the Board majority conditions a union's agreement to the provision on notifying employees of their statutory rights and, if a union agrees to the provision without giving the notice, it will have violated Section 8(b)(1)(A) *even though* the provision itself is not unlawful. The fit between *Teamsters Local 357* and the facts here could not be closer and the precedent could not be clearer, yet my colleagues in the majority have made precisely the ruling the Court foreclosed in 1961.

The majority's distinction of *Teamsters Local 357* from this case on the grounds that *Teamsters Local 357* ''does not deal with a clause that impairs Section 7 rights,'' whereas the union-security clause here does deal with such rights, is specious. In the *Teamsters Local 357* case, the Board was convinced that it was protecting the most fundamental right of all—the right to be free of discrimination and coercion in engaging in or refraining from union activities—and yet the Supreme Court reversed the holding as beyond the Board's authority.

My reading of Section 7, and I am sure the majority will agree, includes a guarantee of ''the right to refrain from any or all such activities [i.e., organization for collective-bargaining activities].'' Section 8(a)(3) prohibits discrimination against employees ''to encourage or discourage membership in any labor organization . . . .'' and Section 8(b)(1)(A) forbids a union to ''restrain or coerce [] employees in the exercise of rights guaranteed in section 7 . . . .'' In *Mountain Pacific*,[29] the case overruled by *Teamsters Local 357*, the Board viewed the control by unions of job prospects through hiring halls as a serious threat to employees' statutory rights:

> From the standpoint of the working force generally, those who, for all practical purposes, can obtain jobs only through the grace of the Union or its officials—it is difficult to conceive of anything that would encourage their subservience to union activity, whatever its form, than this kind of hiring hall arrangement [contained in the parties' bargaining agreement].[30]

The *Mountain Pacific* Board intended to protect employees from the ''statutory evil'' of ''the inherent and unlawful encouragement of union membership that stems from unfettered union control over the hiring process.''[31] I challenge the majority to explain how the contract provision in *Mountain Pacific*, which, in that Board's view, permitted discrimination in hiring against employees who refrained from union activity, does not concern a statutory right while the facially lawful union-security clause here does concern such a right.[32]

Clear as the *Teamsters Local 357* limits on the Board's regulatory authority are, however, the Court went even further in a companion case to demonstrate to the Board that it had no authority to compel unions to provide remedies based on facially lawful agree-

[27] 365 U.S. 667, supra, fn. 4. See also fn. 11, supra, and related text.

[28] Id. at 676 (emphasis added).

[29] 119 NLRB 883 (1957). See discussion at fn. 4, supra.

[30] Id. at 895.

[31] Id. at 896.

[32] My colleagues' other efforts to distinguish this case from *Teamsters Local 357* are also without merit. First, the majority observes that *Teamsters Local 357* was not decided under the duty of fair representation but fails to state how that fact is relevant to the relation between the two cases. Second, the majority notes that in *Teamsters Local 357*, unlike here, employees were not ''required to initiate any communication with their exclusive representative in order to perfect their statutory rights,'' so that the notice there was prophylactic, and therefore proscribed, but the notice here is remedial and therefore permitted. With all due respect, I find this distinction incomprehensible.

ments. In *NLRB v. News Syndicate Co.*[33] the Court flatly rejected Board arguments that contractual language that could be interpreted as requiring discrimination could support a finding of a violation:

> We will not assume that unions and employers will violate federal law, favoring discrimination in favor of union members against the clear commands . . . of Congress. . . . ''In the absence of provisions calling explicitly for illegal conduct, the contract cannot be held illegal because it failed affirmatively to disclaim all illegal objectives.''[34]

My colleagues correctly reject the argument that the provision at issue here calls ''explicitly for illegal conduct.'' Yet, ignoring the Court's prohibitions, they hold here that where a union is privileged to infringe on a Section 7 right, it has a concomitant duty to explain that right and violates the Act if it fails to do so. Such a view would be indubitably correct and might even result in the avoidance of some ''statutory evils''—if Congress had chosen to enact such a provision. In the absence of Congressional action, the majority's holding exceeds the Board's statutory powers.

5. The duty of fair representation and union-security provisions

Even if my colleagues possessed the authority to find the violation and order the remedy here, they have failed to apply binding Supreme Court precedent with respect to the duty of fair representation to the facts at hand.[35] The majority has allowed the analogy between a union's duty to unit employees and the fiduciary duty of, e.g., a trustee to a beneficiary, to swallow the actual legal standard governing the duty of fair representation. The Supreme Court most recently restated and reaffirmed the standard for a breach of the duty in *Air Line Pilots v. O'Neill*:

> a union breaches its duty of fair representation if its actions are either ''arbitrary, discriminatory, or in bad faith''. . . a union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a ''wide range of reasonableness''. . . that it is wholly ''irrational'' or ''arbitrary.''[36]

I see no evidence that my colleagues have applied this precedent to the facts here. Instead, they have allowed the descriptive term ''fiduciary'' to suggest a duty so lofty that its invocation alone justifies penalizing a union for virtually any action that displeases any person with the standing to file a charge. *O'Neill* itself demonstrates that the law does not hold a union to such a high standard: in *O'Neill*, the Court dismissed allegations that a union had violated the duty of fair representation by settling a strike so unfavorably that many striking employees were worse off than if the union had simply ended the strike. While the Court rejected the union's argument that its agreement could not be scrutinized for rationality, it held that ''any substantive examination of a union's performance [in bargaining] must be highly deferential.''[37] The Court criticized the appeals court's finding a violation for failing to recognize ''the importance of evaluating the rationality of a union's decision in the light of both the facts and the legal climate . . . at the time the decision was made.''[38] Finally, the Court noted that one standard, and one standard alone, was to be applied to all allegations of violations of the duty of fair representation: whether the union's conduct was arbitrary, discriminatory, or in bad faith, in the context of the factual and legal situation at the time of the union's decision.

In this case, it is undisputed that the union-security clause the Union negotiated tracks the *Keystone* provision, language that was good law when the Union negotiated the provision and is still good law today. In fact, the Union's care to perform its duty conscientiously has become its own downfall, as that care has, under the majority's twisted logic, become the basis for a finding of bad faith. I cannot see how this Union's adherence to Board law ''in light of the factual and legal landscape at the time of the union's actions'' equals conduct wholly irrational, arbitrary, or in bad faith.

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[33] 365 U.S. 694, supra, fn. 8.

[34] Id. at 699–670 (citation omitted).

[35] I note that circuit courts are interpreting a union's duty of fair representation with respect to union-security clauses under the RLA and the NLRA with a greater sense of the flexibility that the labor laws allow unions to exercise than the majority has exhibited today. Some examples: In *Crawford v. Air Line Pilots Assn.*, No. 88–2083 (4th Cir. Apr. 28, 1993), the court applied the Supreme Court's most recent and, some commentators have said, most flexible interpretation of a union's duty in the public sector, *Lehnert v. Ferris Faculty Assn.*, 137 LRRM 2321 (1991), to hold that the union may charge a pro rata share of strike benefits for other units to objecting fee payers because under the practice of bargaining in the airline industry, negotiations with other airlines determine the level of wages in the unit at issue. In *Grunwald v. San Bernardino City Unified School District*, No. 88–6619 (9th Cir. May 19, 1993), the court approved the use of interest-bearing escrow accounts and provision of refunds as justified where the union, pointing to the fluctuations in school employment, cited sufficient reason to permit a deviation from the strict Constitutional requirement that objectors not be forced, even temporarily, to subsidize nonrepresentational activities. In *Abrams v. CWA*, No. 87–2816 (D.D.C. Apr. 16, 1993), the U.S. District Court for the District of Columbia has held that all aspects of the Communications Workers of America's fee objector procedures, save the requirement of mandatory arbitration, satisfy the union's duty of fair representation, including the publication of fee-objector information in the *CWA News.*

[36] 111 S.Ct. 1127, 1134–1135 (1991). See also cases cited in fn. 3, supra.

[37] Id. 1135.

[38] Id. at 1136.

Further, no factual predicate has been established for the finding that employees are ''confused'' because the Union has agreed to the ''in good standing'' language. Moreover, even if some employees are ''confused'' or the phrase is ambiguous, a union's negotiation of a contract provision with language in it that may confuse some employee can hardly be considered bad faith. If the duty of fair representation were applied as my colleagues have outlined here, then no notice, no contract provision, no correspondence describing *Beck* rights, no communication from a union to unit employees involving statutory or contractual rights would be safe from the allegation that the union violated its duty of fair representation because someone was ''confused'' by the language chosen—even if the union directly quoted Board law. The majority ought to revisit the Board's observations in *Paragon* that *Keystone*'s rigid standards called too many lawfully administered contracts into question and thus presented a danger to the stability of agreements and to labor peace.[39]

6. Model union-security language

Today the majority reaffirms the *Paragon Products* rule and, although it finds the language of the *Keystone* clause ambiguous, it does not explicitly overrule that language. While I strongly agree that *Paragon* is still good law, I find that the signals the majority sends to practitioners and unions are muddled: *Keystone* is ambiguous, but it is still good law; even though it is still good law a union cannot agree to it without giving notice to employees of how the courts have interpreted their statutory rights under a union-security clause; the notice must differ from the *Keystone* language, but the majority provides no ''safe harbor'' language for such a notice; finally, the majority orders the Union here to provide such a notice where there has been no showing that the Union has failed to notify employees of their rights under the statute and binding Supreme Court and Board case law.

In my view, consistency requires that if the majority believes, as it appears to suggest, that *Keystone* is not good law, then it should explicitly overrule *Keystone*'s model clause and provide new ''safe harbor'' language that conforms to the statute and binding precedent.[40] One way of handling the *Keystone* model clause would be to overrule it as a ''safe harbor'' insofar as it uses the ''in good standing'' language; another way would be to start from the statute and work out new language that informs employees of their rights under the law in neutral terms. As the majority is silent on these matters, choosing instead to shuffle the problems of drafting such language off onto unions by creating another unfair labor practice and ordering the fashioning of remedial language without troubling itself to devise such a notice, I offer the language below as a guide and ''safe harbor,'' within the limits of *Paragon Products*,[41] for unions in non-right-to-work States. In my view, it reflects the law with respect to voluntary unionism and union security established by Section 8(a)(3), Section 8(b)(1)(A), *Pattern Makers*,[42] *General Motors*, and *Beck*; in 8(f) situations only the dates of the grace period would need to be changed.

If my colleagues find my suggestions inadequate, I suggest that they wrestle with the difficulties of crafting neutral language that reflects *all* applicable law and binding precedent and *only* applicable law and binding precedent.

Union-security and financial obligations of employees to the bargaining representative:

> [EMPLOYER] and [UNION] exercise their right, under Section 8(a)(3) of the National Labor Relations Act and the laws of [STATE], to agree to the following with respect to every employee who is covered by this Agreement:
>
> (1) Each employee must satisfy, as a condition of employment in the unit, a financial obligation (the Federal law describes this financial obligation as ''membership'') to the Union as the unit's exclusive bargaining representative. This ''membership'' obligation lasts for the life of this Agreement. Employees have three ways to satisfy the ''membership'' obligation, listed here as section 1(a), (b), and (c). Each employee must choose one of these ways to satisfy his/her obligation to the Union. If an employee fails to pay the dues and fees as described in (a), (b), or (c), whichever he/she has chosen, then the Union, upon notice to the employee of the exact amount owed and the manner in which it was calculated, has the right to seek the employee's discharge from his/her unit job. Each employee has the right to choose the ''membership'' status he/she wants without interference, restraint, or coercion:
>
> (a) Full union member: The employee chooses to join the Union as a full member, has all the rights and duties accorded members, and must pay the initiation fee (if applicable) and uniform periodic dues charged by the Union;
>
> (b) Financial core employee: The employee does not become a member of the Union; thus, he/she is not entitled to the full range of rights and duties of membership. If the Union spends

[39] See fn. 18, supra.

[40] As I would dismiss the complaint, I need not express a personal position on the *Keystone* language and I do not do so here.

[41] Thus, I do not suggest that other language would be rendered unlawful by the propounding of this language. I would, however, find that inclusion of the above language or a similarly inclusive clause is evidence of a union's conscientious attention to its duty of fair representation with respect to union-security provisions.

[42] *Pattern Makers League v. NLRB*, 473 U.S. 95 (1985).

part of the dues and fees collected under this Agreement on activities that are not necessary to performing its duties as the exclusive bargaining representative, this employee does not object to having part of his/her dues and fees spend on such activities. This employee must pay the initiation fee (if applicable) and the uniform periodic dues charged by the Union.

(c) Proportionate share employee: The employee does not become a full member of the Union; thus, he/she is not entitled to the full range of rights and duties of membership. Further, if the Union spends part of the dues and fees collected under this Agreement on activities that are not necessary to performing its duties as an exclusive bargaining representative, this employee gives the Union proper notice that he/she objects to the Union's spending part of his/her dues and fees for such activities. This employee must pay the percentage of the initiation fee (if applicable) and the uniform, periodic dues charged by the Union that is used for activities necessary to performing the Union's duties as exclusive bargaining representative.

(2) Each employee who is not a full member of the Union on the effective date of this Agreement (or hire date, whichever is later), has the right to a ''grace period'' of 29 days in which to choose his/her status. Thus,

(a) For all employees who are in the unit and are not full Union members on the effective date of this Agreement [or the Agreement's date of execution, whichever is later], their chosen status and their obligation to pay dues and fees shall begin on the 30th day after the effective date of this Agreement [or the date the Agreement was executed, whichever is later].

(b) For all new employees who are hired into the unit during this Agreement's life and are not full Union members on the date of hire, their chosen status and their obligation to pay dues and fees shall begin on the 30th day after their date of hire [or the date the Agreement was executed, whichever is later].

(3) Employees may change their chosen status. If an employee wishes to change his/her status, he/she may do so upon appropriate and timely notice to the Union. Federal law gives the Union the right ''to prescribe its own rules with respect to the acquisition or retention of membership.'' Unions are not permitted to prohibit employees from resigning their full membership.

I respectfully dissent from the majority's finding that the Union violated Section 8(b)(1)(A) and from the order requiring the Union to affirmatively notify employees of the current state of the law respecting union security.

APPENDIX

NOTICE TO MEMBERS AND EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT restrain and coerce you in the exercise of rights guaranteed in Section 7 of the National Labor Relations Act by maintaining a union-security clause in our collective-bargaining agreement with Paramax Systems Corporation requiring you, as a condition of employment, to be ''members of the Union in good standing,'' without informing you that the extent of your obligation under this clause is the tendering of uniform initiation fees (if any) and dues.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL notify each Paramax unit employee in writing that the only required condition of employment under the union-security clause is the tendering of uniform initiation fees (if any) and dues.

> INTERNATIONAL UNION OF ELECTRONIC, ELECTRICAL, SALARIED, MACHINE AND FURNITURE WORKERS, AFL–CIO
>
> ENGINEERS UNION, LOCAL 444, INTERNATIONAL UNION OF ELECTRONIC, ELECTRICAL, SALARIED, MACHINE AND FURNITURE WORKERS, AFL–CIO

Jacquelyn Knight and *Saundra Rattner, Esqs.*, for the General Counsel.

Sheldon Engelhard, Esq. (Vladeck, Waldman, Elias & Engelhard, P.C.), of New York, New York, for Respondent Local 444.

Robert Friedman, Esq., of Washington, D.C., for Respondent International Union.

Hugh L. Reilly, Esq. (National Right to Work Legal Defense Foundation), of Springfield, Virginia, for the Charging Party.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Pursuant to a charge and an amended charge filed by Lawrence Ferriso on November 12, 1991, and January 6, 1992, respectively, a complaint was issued on January 15, 1992, against International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO (International), and Engineers Union, Local 444, International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers Union, AFL–CIO (Local).

The complaint alleges essentially that Respondents International and Local have maintained in effect and enforced a collective-bargaining agreement with the Employer which contains an unlawful union-security clause in violation of Section 8(b)(l)(A) and (2) of the Act. Respondents' answers deny the material allegations of the complaint, and set forth certain affirmative defenses, which will be discussed, infra. On June 11, 1992, a hearing was held before me in Brooklyn, New York.

On the evidence presented in this proceeding, and my observation of the demeanor of the witnesses and after consideration of the briefs filed by all parties, I make the following[1]

FINDINGS OF FACT

I. JURISDICTION

The Employer, Paraax Systems Corporation, former]y known as Surveillance and Fire Control Systems Division and the Systems Management Unit of Shipboard and Ground Systems Group, Unisys Corporation,[2] a Pennsylvania corporation, having its principal office and place of business in Great Neck, New York, is engaged in the manufacture, sale, and distribution of computer and electronic equipment to the United States Department of Defense, and to commercial customers. During the past year, the Employer manufactured, sold, and shipped computer and electronic equipment valued in excess of $50,000 to the United States Department of Defense, and purchased and received at its Great Neck facility, electronic components and other products valued in excess of $50,000, directly from points outside New York State. Respondents admit, and I find, that the Employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondents admit, and I find, that they are labor organizations within the meaning of Section 2(5) of the Act.

II. THE FACTS

Respondents and the Employer have been parties to collective-bargaining agreements since at least 1970. Respondents have jointly been recognized as the exclusive collective-bargaining representative of the employees in the following collective-bargaining unit:

> Al] employees employed by the Employer at its plants located in Nassau, Suffolk, Kings, Queens, New York, Bronx and Richmond Counties, State of New York, in the following occupations and job classifications:
>
> Senior Engineer, Engineer, Associate Engineer, Assistant Engineer, Senior Engineer-Materials, Senior Engineer-Components, Engineer-Materials or Components, Associate Engineer-Materials or Components, Assistant Engineer-Materials or Components, Senior Publications Engineer, Publications Engineer, Associate Publications Engineer, Assistant Publications Engineer, Senior Design Engineer, Senior Logistics Specialist, Logistics Specialist, Senior Engineer-Planning, Engineer Planning, Associate Engineer-Planning, Assistant Engineer Planning, Senior Manufacturing Engineer, Manufacturing Engineer, Assistant Manufacturing Engineer, Senior Quality Control Analyst, Quality Control Analyst, Assistant Quality Control Analyst, Plant Engineer, Senior Estimator, but excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

All the collective-bargaining agreements since 1970, including the two most recent contracts, which ran from September 1988 to September 1991, and the latest, which was executed on November 25, 1991, and was effective from September 6, 1991, to February 3, 1995, contain the following, identical provision in article 3A-Union Membership:

> All present employees of the Employer, and those who in the future enter the bargaining unit, shall join the Union by the thirtieth day following the beginning of their employment, or by the thirtieth day following the effective date of this provision, whichever is later, and continue to remain members of the Union in good standing as a term and condition of employment.

This clause has not been modified in any way, and remains in effect.

It is this clause which forms the basis of the complaint, which alleges that the collective-bargaining agreement requires that employees become members of the Respondents in good standing, but fails to state that the only condition of continued employment of the employees in the unit is the payment of initiation fees and dues. General Counsel accordingly argues that the union-security clause, quoted above, is unlawful on its face, and constitutes a per se violation of the Act.

Charging Party Lawrence Ferriso has been employed by the Employer for nearly 23 years. He joined the Local in September 1974, and was a full dues-paying member until 1976, when, during a strike at the Employer, he resigned his membership in the Local, crossed the picket line and returned to work. Ferriso was fined by the Local for his activi-

[1] After briefs had been received, counsel for the Charging Party sent me a letter, citing an additional case, and arguing its applicability herein. Respondents sent letters opposing consideration of the letter. Inasmuch as the time for briefs had expired, and no permission had been granted for supplemental citations of authority, I have not considered Charging Party's letter or the responses.

[2] The name of the Employer was amended, as set forth, at the hearing.

ties during the strike, and he then filed a charge against the Local. The complaint which was issued alleged that the collective-bargaining agreement required membership in good standing in the Local as a term and condition of employment. After a hearing, a violation was found as to the Local's fining of Ferriso. *Electronic Workers IUE Local 444 (Sperry Rand Corp.)*, 235 NLRB 98 (1978).

Ferriso is a dues-paying nonmember of Respondents, his dues being deducted by checkoff.

Ferriso testified that when he was a member of the Local, he attended union membership meetings, where he had an opportunity to voice his opinion concerning proposals for contract negotiations. At one time, he objected to the requirement in article 3 of the contract that required him to be a member of the Local in good standing. However, nothing further was done concerning his objection. He could not recall proposing to any official of Respondents, a modification to that contractual provision.

Eugene Kelly, the senior labor relations supervisor of the Employer, testified that the latest collective-bargaining agreement, executed on November 25, 1991, is in full force and effect.

Kelly stated that the procedure used when a new employee begins work is that upon his reporting to his department, the employee's supervisor completes an introduction card which is given to the Local's shop steward who is employed in that department. Within 30 days, the Local gives the employee a membership dues-deduction card. When the card is signed, it is returned to the Local, whose official sends the cards to the Employer with a request that the appropriate dues and initiation fees be deducted from the employee's salary. Upon receipt of such a request, Kelly examines the forms to see if such sums could properly be deducted at that time, and if so, sends them to the payroll department with a request to follow the instructions given in the Local's letter. The payroll department then puts such information into the payroll system, and begins deducting the appropriate sums, and sends them to the Local.

It was stipulated that dues have been deducted from all members of the bargaining unit represented by the Local during the terms of the two latest collective-bargaining agreements for those who have signed dues-authorization and checkoff cards. The dues money goes to the Local, which then sends a per capita tax to the District, and to the International.

Kelly further stated that since at least 1985, neither Respondent has requested that the Employer terminate anyone because of their union membership or lack thereof. In this connection, Ferriso testified that he has never been threatened with discharge because he is not a member of the Local.

Procedural Issue

The complaint alleges that the charge and the first amended charge were filed by Ferriso on November 12, 1991, and January 6 1992, respectively, and served by certified mail upon the Local on about November 14, 1991, and January 6, 1992, respective]y. The Local denies these allegations.

Having been informed by Sheldon Engelhard, attorney for the Local, that he had not received copies of the charges, Jacquelyn Knight, counsel for the General Counsel, on January 23, 1992, sent a letter to Engelhard, which contained copies of the charges and complaint. She also sent such copies on that date to Francis Bianco, the secretary-treasurer of the Local.

Bianco testified that he did not receive the original charge or amended charge, but he did receive a copy of the January 23 letter sent by Knight to Engelhard, adding that that letter included a copy of the complaint. A return receipt for the letter to Bianco is dated January 27, 1992.

It was stipulated that Engelhard received a copy of the charges and complaint with the January 23 letter. It was further stipulated that prior to Engelhard's sending a statement of position on March 12, 1992, he conferred with the Local concerning the allegations set forth in the charges, and the Local's position concerning those allegations. It was also stipulated that the International's statements of position dated December 10, 1991, and January 13, 1992 concerning the charges, was sent to the president of the Local and to Engelhard.

Analysis and Discussion

General Counsel argues that the union-security clause is unlawful on its face, and is per se unlawful because it fails to state that the only condition of employment which may properly be required is the payment of initiation fees and dues. General Counsel arrives at the conclusion that the clause is unlawful based upon the logical inferences to be drawn from *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963), and *Communication Workers v. Beck*, 487 U.S. 735 (1988).

In *General Motors*, the Supreme Court held that a collective-bargaining agreement may permissibly require all employees to become union members as a condition of continued employment, but the ''membership that may be so required has been whittled down to its financial core.'' 373 U.S. at 742.'' In other words, the membership obligation consists only of the requirement that initiation fees and dues be paid. In *Beck*, the Court held that a union violates its duty of fair representation by using the fees and dues collected from an objecting, dues-paying nonmember for activities unrelated to collective bargaining, contract administration, or grievance adjustment.

General Counsel reasons from these cases that certain limitations have been placed upon the union-security obligation, and argues that the Respondents have violated the Act by not setting forth these limitations in the union-security clause. Specifically, the complaint alleges that Respondents violated the Act by failing to state in the union-security clause that the only condition of continued employment is the payment of initiation fees and dues.

General Counsel concedes that there is no case law specifically requiring that this language be included in a union-security clause of a collective-bargaining agreement. Rather, General Counsel argues that the phrase ''membership in good standing'' implies that the employee is required to satisfy obligations other than the requirement to pay initiation fees and dues. Counsel reasons further that in order to satisfy their duty of fair representation, Respondents must (a) refrain from leading employees to believe that their union-security obligations are broader than they are in law and (b) must clear up any confusion which employees may have as to what their obligations are.

Respondents argue that the union-security clause here was adopted from the model union-security clause suggested by the Board in *Keystone Coat, Apron & Towel Co*., 121 NLRB 880, 885 (1958). In that case, the Board held that any contract containing a union-security clause which does not ''on its face conform to the requirements of the Act'' will not bar an election. 121 NLRB at 883. The Board set forth a ''model union-security clause'' as a guide, which was deemed by the Board to be the ''maximum permissible in conformity with the requirements of the Act.'' The clause stated:

> It shall be a condition of employment that all employees of the Employer covered by this agreement who are members of the Union in good standing on the effective date of this agreement shall remain members in good standing and those who are not members on the effective date of this agreement shall, on the thirtieth day [or such longer period as the parties may specify] following the effective date of this agreement, become and remain members in good standing in the Union. It shall also be a condition of employment that all employees covered by this agreement and hired on or after its effective date shall, on the thirtieth day following the beginning of such employment [or such longer period as the parties may specify] become and remain members in good standing in the Union.

General Counsel argues, however, that the mode] clause in *Keystone* was overruled by the Board in *Paragon Products Corp*., 134 NLRB 662 (1961). I do not agree. The *Keystone* clause was not overruled in *Paragon*. Rather, the Board in *Paragon*, a representation case, found that in *Keystone*, a union-security clause, although lawful on its face, was subject to a presumption of illegality if it ''did not expressly reflect the precise language of the statute.'' 134 NLRB at 664. The Board reversed the requirement in *Keystone* that any union-security clause, in order to bar a petition, must reflect the language of Section 8(a)(3). The Board thus held in *Paragon* that only those contracts which contain a union-security clause which is ''clearly unlawful on its face . . . may not bar a representation petition.'' 134 NLRB at 666.

Accordingly, *Keystone's* presumption of illegality for all union-security clauses not tracking the language of the statute was reversed in *Paragon*. *Keystone's* application of the model union-security clause to the contract bar issue was overruled in *Paragon*. The model union-security clause itself was not reversed or overruled.

Accordingly, Respondents' reliance upon the Board approved model union-security clause in the contract involved herein was proper. General Counsel further argues, however, that even assuming that the model union-security clause could be relied upon, the Board erred in *Keystone* in including in the model clause the phrase ''members in good standing in the Union.'' General Counsel correctly argues that that phrase is not included in the language of Section 8(a)(3) of the Act which the Board stated its model clause was intended to conform to. This is an argument that must be addressed to the Board, and I reject it.

General Counsel's complaint alleges precisely what was condemned in *Paragon*—although not illegal on its face, a presumption of illegality is being applied to the union-security clause herein. The Board in *Paragon*, quoted the Supreme Court in *NLRB v. News Syndicate Co.*, 365 U.S. 695 (1961):

> We will not assume that unions and employers will violate a federal law . . . against a clear command of this Act of Congress. As stated by the Court of Appeals ''In the absence of provisions calling explicitly for illegal conduct, the contract cannot be held illegal because it failed affirmatively to disclaim all illegal objectives.''

I do not believe that Respondents have any obligation, pursuant to the Act, to modify their union-security clause to conform to case law as it has developed.

Inasmuch as the contractual language conforms to that set forth in the model union-security clause approved by the Board many years ago, and has not been overruled, I cannot find that Respondents violated the Act by failing to include additional language in such clause.

Other Defenses Raised by Respondents

Although my decision herein dismissing the complaint in its entirety renders moot the Respondents' other defenses, in the event the Board overrules my decision herein, I will discuss such other defenses.

The complaint alleges that the Respondents maintained in effect and enforced the collective-bargaining agreement which contains the allegedly unlawful union-security clause. The International admits the maintenance and enforcement of that clause, but the Local denies that it has enforced it, relying upon the testimony of Ferriso that he has not been threatened with discharge for failing to remain a member of Respondents, and the testimony of Kelly that Respondents have not directed that the Employer terminate anyone during the period of the last two contracts because of their nonmembership in Respondents.

The evidence establishes that the collective-bargaining agreement and its union-security clause are in full force and effect. Dues are being deducted by the Employer pursuant to that clause and are remitted to Respondents. If the union-security clause is found unlawful, it would constitute a violation of the Act even if it was never enforced. *American Tempering*, 296 NLRB 699, 707 (1989).

The Local also denies that it was properly and timely served with copies of the charge and amended charge.

The charges were filed on November 12, 1991, and January 6, 1992. The Local denies that it received those charges. However, its attorney admits receiving copies of the charges and the complaint with General Counsel's letter, which was mailed on January 23, 1992. In addition, the International admits that it received the charges as alleged in the complaint.

In *Buckeye Plastic Molding*, 299 NLRB 1053 (1990), the Board held that the failure to make timely service of a charge on a respondent will be cured by timely service, within the 10(b) period, of a complaint on the respondent, absent a showing that the respondent is prejudiced thereby. The Board also held in that case that service upon the respondent's attorney constituted proper service upon the respondent.

Here, the facts are quite similar. The Local denied service of the charges. Its attorney, Engelhard, admitted receipt of the charges and the complaint on about January 23, 1992, which was the date General Counsel sent them to him. Engelhard, as the Local's attorney, is its agent, and his re-

ceipt of the charges and the complaint on about January 23, 1992, within the 10(b) period, which commenced on November 25, 1991, is valid service upon the Local. In addition, the Local's secretary-treasurer, Francis Bianco, admitted receiving the complaint on about January 27, 1992. Thus, under *Buckeye*, the Local was properly served within the 10(b) period.

In addition, the Local is an affiliate of the International. Both organizations are described as the ''Union'' in representing the unit employees herein. Their answers admit that they have jointly been the exclusive collective-bargaining representative of the unit employees and have jointly been recognized as such by the Employer. As the joint representative of the employees, service on one constitutes service on the other. *Electrical Workers IUE (Spartus Corp.)*, 271 NLRB 607 (1984); *Laborers (Associated General Contractors)*, 243 NLRB 405 fn. 1 (1979). Thus, inasmuch as the International admits timely service of the two charges, the Local was thereby timely served with the charges.

The Local also argues that the Board has failed to join a necessary party herein, by failing to name the Employer as a respondent. It contends that the Employer is a party to the allegedly unlawful collective-bargaining agreement and therefore should have been included as a respondent in the complaint.

I reject this argument. The Board has consistently held that an employer is not a necessary party in cases involving violations of Section 8(b)(2) of the Act. *Iron Workers Local 377 (M.S.B., Inc.)*, 299 NLRB 680, 684 (1990); *Boilermakers Local 37 (Delta Maintenance)*, 272 NLRB 326, 330 (1984). It would therefore follow that the employer is not a necessary party in a Section 8(b)(1)(A) case.

The Respondents further argue that inasmuch as General Counsel was aware of the allegedly unlawful union-security clause prior to the issuance of this complaint, and in fact had set forth that clause in a prior complaint which was issued in 1977, the General Counsel is therefore estopped from now alleging that such provision violates the Act. In a related defense, the Local argues that this complaint is time barred by Section 10(b) of the Act.

The complaint is not time barred by Section 10(b) of the Act. The complaint alleges a violation concerning the union-security clause of the collective-bargaining agreement. That agreement was executed on November 25, 1991. The charge and first amended charge were filed on November 12, 1991, and January 6, 1992, respectively, within the 10(b) period. The fact that the identical clause has been in Respondents' contracts for 22 years, but has not been the subject of a charge, does not establish that the complaint is barred by Section 10(b) of the Act.

Moreover, even if a charge had been filed in 1977, alleging the unlawfulness of the union-security clause, and assuming that General Counsel had refused to issue a complaint, such conduct would not preclude the General Counsel from issuing a complaint on the identical clause now. The General Counsel has unreviewable discretion to refuse to issue an unfair labor practice complaint.

> [E]ven in cases involving identical conduct by the same parties, the Board is not bound by the decision of a General Counsel not to issue a complaint on a prior occasion. [*National Gypsum Co*., 281 NLRB 593, 601, fn. 21 (1986).]

CONCLUSIONS OF LAW

1. Respondent International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO and Respondent Engineers Union, Local 444, International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers Union, AFL–CIO are labor organizations within the meaning of Section 2(5) of the Act.

2. Paramax Systems Corporation, formerly known as Surveillance and Fire Control Systems Division and the Systems Management Unit of Shipboard and Ground Systems Group, Unisys Corporation, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. Respondents have not violated the Act as alleged.

[Recommended Order for dismissal omitted from publication.]